83-338

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

SADIK XHEKA and BEHA XHEKA

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision below creates a clear conflict within the various circuits of the United States concerning the scope of 18 U.S.C. §844 (i).

2. Whether the Court erred in holding the conspiracy open and ongoing because insurance proceeds had not been recovered and allowing the co-conspirators tape into evidence against the non-present defendant.

3. Whether the Petitioners were denied a fair trial and due process of law by the prosecutors purposeful and repeated suppression of favorable evidence to their refuse.

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OPINION BELOW

United States Court of Appeals for the Seventh Circuit affirmed petitioners' judgments of convictions. The Opinion of the United States Court of Appeals for the Seventh Circuit is unreported as yet and appears in the Appendix.

JURISDICTION

The Judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 6, 1983. The Order of the United States Court of Appeals for the Seventh Circuit denying the Petition for Rehearing was entered June 7, 1983. This Petition for Certiorari was filed less than 60 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

18 U.S.C. §844 (i)

18 U.S.C. §844 (j)

18 U.S.C. §81

18 U.S.C. §1153

18 U.S.C. §1952

18 U.S.C. §232 (5)

28 U.S.C. 2255

United States 5th Amendment

United States 6th Amendment

Federal Rules of Evidence 801 (d) (2) (e)

Federal Rules of Evidence 104 (a)

Federal Rules of Evidence 403

STATEMENT OF FACTS

John Jurman testified he was an engineer employed at the Trans Union Building (Tr. 2-3). He testified that he worked Sunday evening July 25, 1976, arriving around 11:25 p.m. (Tr. 4), because he had to check the electrical vault in the basement kitchen (Tr. 5). He entered from the lobby entrance with his master key (Tr. 5). He met a large black man about 6'3" tall, bald headed and wearing glasses (Tr. 6), whom he told he was the cleaning man (Tr. 7). The man showed him some keys. Jurman went downstairs with the man (Tr. 8). He was downstairs for 5 or 10 minutes and then left, the man following him back upstairs to the lobby door (Tr. 8). Jurman let himself out and the black man locked the door using a key (Tr. 9). Jurman returned 5 or 10 minutes later again entering with his keys and met the man again (Tr. 10). He returned to the electrical vault and worked on the air conditioning, leaving about 20 minutes later (Tr. 10). The black man again locked the door from the inside with a key (Tr. 11). He observed toweling of the kind used on rolls in washrooms all over the floor (Tr. 12). Around 12:20, he

spotted the fire and pulled the fire alarm (Tr. 12-13). During the afternoon of July 26, 1976, he viewed photographs and identified Wadie Howard as the black man (Tr. 15).

On cross, he said there were three entrances to the building (Tr. 37) one entrance to the restaurant located on LaSalle Street (Tr. 28), a garage entrance for vehicles on Clark Street and an exit ramp located on LaSalle Street (Tr. 39). On the weekends, the door is shut off and only the security guard can electrically activate it with a key (Tr. 40-41-63). When he went into the restaurant, he directly passed the manager's office (Tr. 46-47), and did not see anyone there. No one was upon the premises except him and Howard (Tr. 48-49-50-51). He heard no conversation and saw no light inside the office (Tr. 65-66, 76) and Howard had no opportunity to warn anyone downstairs that he was approaching (Tr. 67-68). Anyone leaving the Bull and Bear would have to either exit the LaSalle Street door to the street, exit to the lobby of the building, or exit the basement to the garage (Tr. 56), but if they exited the basement, the security guard would have to let them out. He saw no one leave the Bull and Bear and (Tr. 56) never saw Sonny there that night (Tr. 57).

Deputy Chief Meeker testified that he was in charge of striking the fire. He got the call at 12:36 a.m., and responded in two minutes (Tr. 90-91). He found "trailers" around 150 feet long soaked in gasoline across the kitchen, down a stairway into the disco area and two 55 gallon drums of gasoline (Tr. 95-96). Gasoline was spilled on the floor, but there was no burning in the basement (Tr. 95-96). Meeker testified that he inspected the provisions, supplies, and liquor on the premises, and found them to be sparse (Tr. 96, 97, 98). He never looked into the refrigerators, nor did he specifically investigate to determine what inventory was there (Tr. 106-108). His report indicated the origin of the fire was in the kitchen which

was the full length of the restaurant away from the LaSalle Street door (Tr. 115-117).

Ciolli next testified he was a bomb and arson investigator and investigated over 6,000 fires including the Bull and Bear (Tr. 131-132). His assignment was to determine the origin of the fire (Tr. 137). He found the fire most intense on the west side of the restaurant on the ground level closest to LaSalle Street (Tr. 138). He noted the trailers soaked in gasoline and observed the two drums of gasoline (Tr. 141-142). He examined for forced entry and found pry marks on lobby entrance made by firemen, but no pry marks on the LaSalle Street door (Tr. 145). He examined supplies and liquor stored on the premises and found very little on the premises (Tr. 142, 162, 164). Analysis of the trailers and fluid samples taken, disclosed that hydrocarbons similar to gasoline were contained therein (Tr. 149). He had a conversation with Sonny, relative to the description of black man seen on premises and asked him about the gasoline drums. Sonny denied knowledge of either (Tr. 153, 154, 155).

On cross he admitted that Howard, was a well known professional arsonist and his identity was suspect as soon as Jurman gave a description (Tr. 167). No fingerprint tests had been attempted upon the gasoline drums. They had lettering upon them indicating food products as contents and serial identification numbers (Tr. 185, 190-192), but nothing was done to attempt to trace the drums (Tr. 193). He examined the manager's office and found nothing missing or removed therefrom (Tr. 227). His investigation did not disclose any financial problems which would indicate a motive for the fire (Tr. 231).

Sandra Olson testified that at 11:30 p.m. on the night of the fire she was parked across from the Bull and Bear on LaSalle where the lighting was good (Tr. 251-252). Around midnight she saw a large black man with black glasses, bald headed, standing in the doorway to the garage ramp looking up and down the street (Tr. 255-

256). He remained there a minute and then walked north toward Jackson and out of her view (Tr. 257). Around 15 minutes later the man returned and her attention was called to him because she heard glass break and saw the man run south on LaSalle to a parking lot next to the Trans Union Building and then east through the lot out of sight (Tr. 258). She identified Wadie Howard as the black man she saw (Tr. 259).

On cross, she acknowledged that she was parked directly across from the garage exit door of the Building (Tr. 264-265). She saw no cars exit while she was there (Tr. 268). The garage door was down and remained so the whole time. (Tr. 269). When Howard walked north on LaSalle she lost sight of him, but had a clear view of the LaSalle Street door and he walked beyond that (Tr. 272). He did not enter the door. She was certain that she heard glass break first because her attention was aroused by it. (Tr. 258-259, 274). It preceded the boom and she saw Howard running before that (Tr. 274). When she saw flames, Howard was already either in the parking lot or past it (Tr. 275). The first breaking glass was around the entrance door (Tr. 276) and at least two or more seconds elapsed between it and the boom (Tr. 275). She told the investigators that night he threw something into the restaurant (Tr. 279). She still believes he threw an object into the restaurant when the glass broke and then ran (Tr. 280-281).

Investigator Williams testified he has been assigned to the bomb and arson unit since 1971 (Tr. 291). At 8:30 on July 26, 1976, he proceeded to the scene to begin his investigation. He noted the trailers and had seen them at many fires before. They cause the fire to spread (Tr. 295-296). The trailers upstairs were charred, but the ones downstairs in the basement were not (Tr. 295). He interviewed Jurman and Olson (Tr. 299). He concluded that the origin of the fire was at the LaSalle Street door (Tr. 299-300) and stated it was probably started from

outside the restaurant because of the hazard of igniting the trailers inside might result in igniting oneself (Tr. 359-360). He interviewed Sonny at the scene and determined that he was home at the time of the fire and was called to the scene (Tr. 304).

On cross, Williams acknowledged that although bomb and arson has over 1,000 photos of known arsonists (Tr. 339), he picked Howard out and only selected the other five pictures for lineup purposes (Tr. 340). Upon receiving the description and based upon the circumstances of the fire, he focused on Howard as the prime suspect (Tr. 341-343, 360). He knew Howard well, as did other arson investigators, as a professional arsonist.

Next to testify was Wadie Howard. On July 1, 1976, he was in a bar called Zorba's at Wilson and Sheridan Road with Chris Callas (Tr. 416). Callas told him that he had a friend downtown that had a problem and that Howard could probably take care of it (Tr. 418). The name given to him was "Sonny"—No last name and the name Bull and Bear Restaurant at 111 West Jackson (Tr. 419). There was no mention as to the nature of the job (Tr. 420). On July 3, 1976, a Saturday, at about 5:30 p.m., Howard went to the Bull and Bear (Tr. 421, 604) and entered by the LaSalle Street door into the upstairs bar, had a drink and asked the bar maid for Sonny (Tr. 421, 604). Sonny appeared at the bar (Tr. 421). Howard introduced himself and said he was sent by Chris (Tr. 422). Sonny said to wait a minute and went and made a phone call (Tr. 422), after which he returned and took Howard on a tour of the restaurant (Tr. 423-424). He met Sonny's brother Billy (Beba), and a black cook (Tr. 424), but they never did speak a word to each other (Tr. 425). Sonny told him to look the place over and give him a price, that he wanted the place totally destroyed (Tr. 425). He quoted Sonny the price of $5,000 plus expenses (Tr. 426). Howard asked for $400 expense money and received it from Sonny (Tr. 427). Billy said nothing at all (Tr. 427). Sonny and Howard agreed on a date for Howard to return

to pick up his first installment which was set Saturday, July 10, 1976, at 5:00 p.m. (Tr. 428, 605, 606, 608).

On that date, Howard returned to the restaurant around 5:00 p.m. again entered the LaSalle Street door to the restaurant (Tr. 428). He sat at the bar, ordered a drink and then went to the lower level where he met Sonny (Tr. 429). Sonny, Billy, and Howard went into the manager's office where Sonny gave Howard an envelope with $2,500 cash (Tr. 429). Only Sonny spoke and said the job must be done before the first of the month because his bills fell due (Tr. 430). Howard agreed (Tr. 431). Billy was sitting at a desk and again did not speak at all (Tr. 431). Sonny told Howard to return on July 21, 1976, to pick up the final payment (Tr. 432).

On July 21, 1976, at 3:00 p.m. he returned (Tr. 432) had a drink at the bar upstairs and went to the lower level to pick up his final payment (Tr. 432). He saw Sonny, Billy and the black cook. Sonny went into the office and returned with the $2,500 (Tr. 432). Billy just stood there and said nothing (Tr. 433). Sonny told Howard this was the last payment (Tr. 434).

On July 22, 1976, at 2:00 p.m., Howard purchased two 55 gallon drums at a junk yard (Tr. 435). On July 23, 1976, he took the drums to 87th and Racine and filled them with gasoline (Tr. 436). He drove to the building arriving around 9:00 a.m. (Tr. 437). He parked the truck on Clark and waited for Sonny (Tr. 438) and took the drums to the basement of the restaurant (Tr. 439). Billy and the black cook were there (Tr. 440) and the cook joked saying he never saw cooking oil delivered in those type drums (Tr. 441). Sonny told him to store the drums in the wine cellar. Billy again said nothing (Tr. 442). Sonny told Howard to return Saturday night July 24, 1976, to pick up a key to get into the restaurant (Tr. 443). On Saturday, July 24, 1976, just before midnight he met Sonny near the Bull and Bear on LaSalle Street got a key to enter the restaurant (Tr. 447). Sonny reminded him

that the job had to be done before the first of the month (Tr. 449).

On July 25, 1976, he drove to the Bull and Bear and parked on Clark Street walking across the lot to the LaSalle Street entrance (Tr. 450). He entered with the key Sonny had given him (Tr. 450). The building engineer came in on only one occasion, not two. (Tr. 451). Three other people were present in the Bull and Bear that evening in the office playing cards (Tr. 451-452), Sonny, Billy, and an old white haired man (Tr. 452). The last time he saw Sonny was when he was spreading the towels to burn the place and started to pour gasoline (Tr. 453). He saw Sonny rifling the office, taking money and insurance papers from the safe (Tr. 454). After he set the trailers, he carried a lead towel to the LaSalle Street door (Tr. 455) took a cigarette lighter, lit the end of the towel and stepped out of the door (Tr. 455). He left the scene and heard a boom and falling glass, but saw nothing (Tr. 445-446). Around 5:00 p.m. July 26, 1976, he was arrested at his house and told the arresting officers he worked at the Bull and Bear as a cleaning man (Tr. 457). He spoke with his wife Barbara Jackson, on July 26, by telephone regarding bond money (Tr. 458). He never saw her at the station, but told her he had an I.D. in a chest of drawers and to take that and contact Sonny and tell him he had sent her (Tr. 459). He saw her two days later on July 29, 1976, at the Criminal Court Building, where they had a conversation in a jury room behind the Court (Tr. 459). She had gotten only $200 and he needed $1,000 for bail (Tr. 459). He told her to see Sonny again and get more money, which she did and bailed him out (Tr. 460). About one week later, he met with Sonny at Elliott's Restaurant. (Tr. 460) A man named John owned and managed Elliott's (Tr. 461) and when Sonny arrived all three of them went into John's office (Tr. 461). Howard told Sonny he needed $2,000 and Sonny told John to give it to him (Tr. 462).

Howard was tried and acquitted of the Bull and Bear arson in State Court (Tr. 463). He was then indicted in

the Federal Court for the Bull and Bear and Seville House fires, was tried for the Seville House and acquitted (Tr. 466). In July 1979, he was in the M.C.C. awaiting trial on the Bull and Bear charges unable to make bail. He attempted to contact Sonny, but could not reach him (Tr. 467), so he called the government instead and began cooperating (Tr. 467). He plead guilty to the charges on August 1, 1979, and was sentenced to six months in M.C.C. and 4½ years on probation (Tr. 468). He received compensation from the government for expenses in the amount of $1,600 (Tr. 468). The only promise given him was that the government would not oppose a reduction in bond so he could be released (Tr. 469). He did have a conversation with agents who told him of a monetary reward, he could be recommended for if he cooperated and he hoped to receive this reward (Tr. 470).

On cross, Howard admitted he was familiar with the Bull and Bear and had been there many times before July 1976, as an ice cream salesman stopping there twice a week for almost two years (Tr. 535). He also stated that he was sure he met Callas at Zorba's in July, 1976 and had been there many times (Tr. 561-562). He denied he ever burned down a restaurant before or after the Bull and Bear (Tr. 569). He never told Callas he ever burned down a restaurant and nobody had any reason to believe he was involved in arsons prior to the Bull and Bear (Tr. 570). Howard had received all his money up front and that he was fully paid in July, 1976, (Tr. 575-576). He changed his direct testimony and said that he never discussed any money with Callas in July, 1976 (Tr. 577-578, 595). After the fire, Callas never expressed any interest in the Bull and Bear fire (Tr. 580).

For a long period, he had been employed by the Ladas Family also known as Christopolos (Tr. 582). When he had this alleged conversation with Callas and all during July, 1976, he was employed by the Ladas Family. He denied working in a gas station, in fact, the very gas

station at 87th Street that he filled the gas drums, and was impeached by his testimony before Judge Korcoras. He attempted to explain that he was a salesman not really an employee of the station (Tr. 587-588, 637).

No specific date was set for the fire and he never told Sonny or Billy he was going to burn it on evening of July 25, 1976 (Tr. 625). He picked the night at random and made no arrangements to set that as the night (Tr. 660). He denied even cleaning, painting, or lettering the drums and claimed they were in same condition they were at the junk yard (Tr. 631-632). The truck he used to transport the drums was rented under a fictitious name he did not remember. He had borrowed a drivers license because he has not had one for years (Tr. 635). He got only one key and was told by Sonny that it fit every door in the place (Tr. 649-650). He went into the Bull and Bear on July 23, 1976, in the early morning hours to try the key (Tr. 650). He entered about 12:30-1:00 a.m., nobody was there, it was Friday night, Saturday morning (Tr. 650). He went to the wine cellar and removed 12 to 15 cases of liquor and took them to his home (Tr. 651). He did this all by himself and carried them out the LaSalle Street door (Tr. 651). He admitted that he omitted it from his July, 1979, statement and Grand Jury testimony, and that he first told the agent ten days ago and the agent took notes of this conversation—it was agent Gorecki (Tr. 651-652). He also told the prosecutors. He did not use a key to get into the liquor room, because the padlock on the door was open. He saw nothing wrong with taking the liquor because he was going to burn it anyway (Tr. 658).

He denied seeing Sonny and Billy leave the restaurant but admitted testifying before the Grand Jury that he did see them leave (Tr. 680). He denied knowing when the old white haired man left, but again admitted testifying before the Grand Jury that he left before Billy and Sonny (Tr. 693). He acknowledged that Billy and Sonny left

through the garage and he heard a car door slam (Tr. 693). Howard never left the building after he first entered until he set the fire and was not outside on LaSalle Street around midnight. Mrs. Olson was lying or mistaken (Tr. 698). He did not walk north on LaSalle around midnight (Tr. 699) and he did not break, nor throw anything through the windows (Tr. 700-701). At least one minute elapsed between the time he lit the trailer and the noise (Tr. 702) and at that time he was 25 feet away from the door (Tr. 704).

He worked for Simon Frangos and Anthony Angelos in their strip joints and massage parlors (Tr. 707, 708, 709). These men are known as bankers (Tr. 719) as were the Christopolos Family. He denied that Sonny and Billy were heavily indebted to the bankers, but admitted he earlier said the Xhekas were financially so tied up that it was like they were working for someone else because they had so many notes to pay (Tr. 715, 761). Bankers are juice lenders and establish loans to purchase restaurants. When a guy gets in trouble they take the business back if he cannot pay and sell it to the insurance company (Tr. 722-723). The Christopolos' paid him $1,600 per month cash plus $500 per month cash bonus (Tr. 750). George Christopolos was murdered in the summer of 1979 (Tr. 750). Prior to that, Christopolos always made bond for him and he could count on Christopolos to help him out (Tr. 751-752). When he went to the government for help Christopolos' made the bond for him on the Seville fire (Tr. 770). Christopolos' death was a factor in his turning government informer (Tr. 769).

When arrested, he was transported to 51st and Wentworth (Tr. 752). From 51st and Wentworth he was taken to the County Jail. He never saw Barbara Jackson at 11th and State (Tr. 757-758). He needed bond money even though in the three week period prior to this arrest he had received $5,400 cash from Sonny and $1,600 cash from Christopolos and his bond was only $1,000 cash (Tr. 757).

He first saw Barbara Jackson in a Court lockup behind the chambers (Tr. 759-760). That night or the next day he made bond (Tr. 761-762). She brought the money down and bailed him out (Tr. 763). She told him she had met with Sonny a second time, had received an additional $1,000 and had already received $200 before he was bailed out on July 28, 1976 (Tr. 764).

He considered the lengthy penalty facing him when he contacted the government, but he denied that he knew the possible penalty (Tr. 776). He said he knew it carried a prison term and he did not want to spend one more day in jail (Tr. 777). He knew his substantial prior criminal record would be used against him at sentencing, but he denied that he was a four time convicted felon (Tr. 777).

He later admitted he was a four time felon and was aware of the possible "substantial" prison sentence awaiting him (Tr. 782). He received 5 to 14 years in 1947 for robbery (Tr. 783). In 1949 he was again sentenced to 5 to 14 years in prison (Tr. 783). He was rearrested in 1966 for a felony and received two years probation. In 1971, he was arrested for arson and attempted arson and plead guilty thereto after the charges were reduced to criminal damage to property (Tr. 784). He denied that he cooperated because of this extensive record claiming he did so only to make bond (Tr. 784). He only contacted the government for bond reduction and not because of his inability to hire an attorney since he already had a Court appointed lawyer (Tr. 788). However, he testified earlier that he did so, not so much for a bond reduction, but really because he did not have money to defend himself on the charge and hire a lawyer (Tr. 780-791). The only agreement he had was that they would not oppose a bond reduction (Tr. 793). His punishment was never discussed and no agreement was entered into regarding sentencing (Tr. 795-796). The $1,600 he received was reimbursement for expenses and before Judge Kocoras he claimed to have received only $500 (Tr. 801-802).

He denied that Mr. Fleischman did anything on his behalf regarding sentencing and merely recommended a jail sentence commensurate with the crime (Tr. 805-806).

Howard finally admitted that the government did in fact make a recommendation on his behalf and told the Judge he had cooperated (Tr. 809-810).

Howard denied that he had committed any crimes since his sentencing (Tr. 814). He knew that if you take someone's money under a false promise to do something, it is a crime (Tr. 817). He did take money from Mr. Sheridan, but he denied that he took it under false pretenses (Tr. 817). He claimed Sheridan merely gave it to him, he did not solicit it (Tr. 817). He denied taking money in exchange for doing an act he never intended to do and denied the money was payment for him to do any illegal or criminal act (Tr. 817). Sheridan had contacted him to beat up a Mr. Hall. He did receive $250 and was to receive another $800 when he put Hall in the hospital (Tr. 818). This occurred while he was on probation and after he promised Judge Bua he would not commit any other crimes (Tr. 818). However, he claimed the money was merely for expenses. Howard said he was told by Agent Gorecki to go to see Sheridan.

He finally admitted that the agents told him not to go see Sheridan (Tr. 863), but he insisted that this was after he had already met with Sheridan and he denied the telephone overhear related in the agent's report of the incident (Tr. 863-864). He admitted that six months after the agents came back and confronted him about the money (Tr. 865). The agents asked him why he defied their instructions not to contact Sheridan (Tr. 865). He has taken money under false pretenses and committed such crime hundreds of times in the past (Tr. 866-867). He is good at it and frequently takes money to burn down restaurants never intending to do so (Tr. 866). He has done this so often, he cannot remember how many times and in his mind these were all criminal acts (Tr. 867). With Sheridan, it was different because he only took money for

expenses (Tr. 868). He claimed the distinction was his subjective justification of it all as to whether it was legal or illegal (Tr. 868). He admitted that before Judge Kocoras on three occasions, he denied having committed any offense or illegal act since his release, that the Sheridan incident had occurred within that time and he was aware of it when he made those answers (Tr. 870, 871, 872, 874). The reason for his answers, were that he subjectively did not believe this to be a crime.

Howard was asked if any of the restaurants he took money from eventually did burn down (Tr. 878), and he responded that he could not remember any (Tr. 879). He was reminded of his testimony before Judge Kocoras regarding the Quality Food Store (Tr. 879). He responded that he never knew the Quality Food Store burned despite the trial and he thought that only was an attempt (Tr. 880). He admitted that he was asked to burn Andy's West, after first denying it, and that it also ultimately burned (Tr. 882-883). The same was true concerning Pierson's Corner (Tr. 884). He further admitted that he related to the agents, the identities of other arsonists and their specialties in starting fires (Tr. 887) as well as the various methods arsonists use including trailers and "toasters" and how they operate (Tr. 888). However, later he changed this and denied any knowledge of the term "toasters" (Tr. 898-899). He was then shown the transcript wherein the word toaster was used but he said this was inaccurate he used the term "pizza oven" not "toaster" (Tr. 899-900). "Pizza Ovens" are remote control devices like garage openers to start fires. Steven Ganas demonstrated them to him in case he knew anyone who would buy some for arsons (Tr. 900-901).

He never heard of the term "trailers" before he entered this Courtroom (Tr. 902) despite his earlier admissions that he told agents about their use (Tr. 877, 888). In the Bull and Bear, he used hand towels soaked in gasoline only based upon what he had read about arsons in newspapers

and seen on TV (Tr. 902-903). He setup the Bull and Bear with no expertise and no prior experience, but solely based upon what he had read and heard in the media about such arsons (Tr. 903). The Bull and Bear was not setup like a professional job despite the preparations taken to spread the fire (Tr. 905). He set the wicks outside the door, not as a professional to avoid igniting himself, but just on the gamble and guess that the fire would burn through the door and ignite the trailers inside (Tr. 906). He admitted giving the agents information on around 20 other fires besides the ones already mentioned (Tr. 914). He denied receiving many offers to commit arsons, and was cross examined concerning his contrary testimony that a lot of people contact him to commit arsons and he has a lot of offers to commit arsons (Tr. 916-917). He could not explain why he gets all these offers if no one had reason to believe he was an arsonist (Tr. 919). He still insisted he never committed any arsons before or after the Bull and Bear (Tr. 921).

The two meetings his wife had with Sonny preceded July 28, 1976, when he was released from jail (Tr. 925). He told the agents originally there was only one such meeting at 159th and Kedzie (Tr. 926). However, that was wrong (Tr. 926). Howard was asked if the last time he saw Sonny was at this alleged meeting at Elliott's (Tr. 927). On direct, he testified to only one such meeting and said it was the last time he saw Sonny (Tr. 766). However, he changed his testimony at this time and now related a second meeting at Elliott's claiming to have told the government of this ten days ago (Tr. 927). The prosecutors, in front of the jury, nodded in agreement with Howard. He admitted never mentioning the second meeting in prior testimony (Tr. 946). He admitted that on direct, he testified he last saw Sonny on August 3, 1976, at Elliott's and that all future meetings were to be at the Hinsdale Oasis (Tr. 948). He was wrong and had forgotten the second meeting despite the fact he told the government of it just a few

days earlier (Tr. 948-949). At the meeting in front of Islami, he discussed the arson and John knew why Sonny was giving Howard the money (Tr. 951-952).

Howard plead guilty to a reduced charge of arson and attempt arson (Tr. 963), because his lawyer made a quick deal with the prosecutor (Tr. 965). These incidents occurred one night apart at a restaurant at 4785 North Milwaukee (Tr. 964). The only thing he did was deliver gas to an alley because he was paid to do so, not by the owner but by one of his competitors (Tr. 967-975). He had no knowledge of an arson nor knowledge as to why anyone would want him to deliver gas to the alley behind the restaurant (Tr. 967). Howard would do almost anything for money; he has committed arson for money; he has lied for money; and he has stolen for money (Tr. 984-985). He denied that he has committed any other crimes not yet related to the jury (Tr. 994). He was asked as to whether he paid taxes on the cash he earned from Christopolos for at least three years and the money he received for various illegal acts (Tr. 994-997) and whether he ever told the government he never paid income taxes. He said the government never asked him (Tr. 997). Howard was never prosecuted nor his probation violated for tax evasion (Tr. 998).

Howard, on redirect, re-affirmed his earlier testimony that he told Callas he would give him a few bucks (Tr. 1040-5) and when he testified on cross examination to the contrary, he was wrong (Tr. 1040-4). He did not see Callas from 1976 to 1979 (Tr. 1040, 1748) and he never told Callas what he did at the Bull and Bear (Tr. 1040-48). Whereupon Howard was excused subject to being recalled regarding the tape.

(The transcript is numerically out of order and picks up at this point at page 1133 with the testimony of Shaban Islami.)

Shaban Islami testified and he is also known as John (Tr. 1133). He owned Elliott's Restaurant in 1975 and

1976 and knew Sonny and Billy since 1966-67 (Tr. 1136-1137). In the summer of 1976, he remembered a black man came into Elliott's (Tr. 1141) who he could not describe because he does not remember him (Tr. 1142). The man came into his kitchen and John chased him out (Tr. 1143). He was looking for a dishwasher's job and John did not need a dishwasher. He sat at the counter and had a cup of coffee (Tr. 1143). Later Sonny came in and they talked about the mortgage payment which Sonny looked after because he had co-signed on John's loan (Tr. 1143). He mentioned to Sonny about the black man sitting at the counter, that if Sonny needed a dishwasher, he was looking for a job (Tr. 1411). Sonny talked to the man (Tr. 1144). He did not give Sonny any money at that time, but did so after the black man had left at which time he gave Sonny around $1,000 (Tr. 1144). Sonny and John sat in the office after the black man left (Tr. 1145). On cross examination, Islami testified that the black man was never in the restaurant before that date, he never saw him since that date and he was sure that he was only in there on one occasion (Tr. 1160).

The next witness was agent Adair of the A.T.F. who testified that on November 20, 1980, he interviewed Islami, whereupon he told the agent that in fact the black man upon entering the restaurant specifically asked for Sonny (Tr. 1165). This testimony was neither in Islami's Grand Jury nor trial testimony.

Kenneth Malatesta testified that he was an assistant State's attorney and was called to approve the filing of charges against Howard regarding the Bull and Bear (Tr. 1168). He interviewed both Howard and Sonny. Sonny answered all of his questions and said he did not know Howard and he had not authorized him to be in the restaurant (Tr. 1168). Howard was at Area 1 located at 51st and Wentworth.

Richard Bruggerman testified that he was the manager of the Trans Union Building at the time of the fire (Tr.

1218) and he collected rents and maintained the building. He knew Sonny and Billy and was familiar with their lease (Tr. 1220-1221). The rent was based on the square footage and due on the first of each month, plus escalation based upon an allocation of building expenses and cost increases over the base year which was due 30 days after billing which occurred once a year, usually April 1st (Tr. 1223-1224). The Bull and Bear was current on its rent (Tr. 1225-1226). After the fire, the lease continued but rent abated until the building restored the premises to their base condition. The building was supposed to do this within 30 days (Tr. 1225).

On cross, Bruggerman acknowledged that the fire insurance regarding coverage amounts were set in the lease by the building requiring the Bull and Bear to carry the coverage they did (Tr. 1232). He hired the security guards who were on duty around the clock at all times (Tr. 1236-1238). Security was responsible for admitting only authorized persons to the building when it was closed (Tr. 1240). Anyone coming into a garage would have to enter with clearance from a security guard (Tr. 1241). The Bull and Bear did not have parking privileges and could not use the garage (Tr. 1267). Bruggerman recalled that the building frequently experienced difficulty and litigation over escalation rent (Tr. 1243) and the Bull and Bear did disagree over the square footage assessment (Tr. 1250). There was a lawsuit over it and the dispute did not involve their inability to pay, but a controversy over the propriety of the amount (Tr. 1257-1258). There never were any forcible entry and detainers proceedings instituted for any delinquency and there never was a suit to cancel the lease because of the nature of the operation (Tr. 1259-1262). The loading dock was usually kept locked, but during times when the building was open to the public it was frequently left open and unattended and somebody could easily drop off objects on the dock and leave them there unnoticed (Tr. 1246-1247). The Bull and Bear had two different keys

for the restaurant doors. One key fit all the inside doors leading from the Bull and Bear to the lobby. The other key solely fit the LaSalle Street door of the Bull and Bear leading directly out to LaSalle Street (Tr. 1250-1251). The Bull and Bear was open (Tr. 1262) Monday through Friday and ½ day on Saturday, however, only the coffee shop was open on Saturday (Tr. 1263). The upstairs lounge and the LaSalle Street door were only open (Tr. 1265) Monday through Friday and the lounge and LaSalle Street door were locked all day Saturday (Tr. 1263). The Bull and Bear had a disco in the basement lounge and it ran Friday and Saturday evenings until 1:00 a.m. (Tr. 1261). When Xhekas took over the lease, the locks were not changed because the building needed the master key to service the electrical and air conditioning vaults in the basement (Tr. 1266). If the locks had been changed he would have received new keys which never occurred (Tr. 1266).

Jean Thompson testified, she has known Howard and Barbara Jackson for 30 years as a very close friend (Tr. 1278). In July of 1976, she knew of the arrest and afterward made some trips with Barbara Jackson (Tr. 1281). The first trip was to 159th and Kedzie to a shopping center where they waited in the car for 10 minutes until a man came into the lot and circled their car a couple of times (Tr. 1282). They then went into a K-Mart and the person came into the store whereupon she left Barbara and the man alone to talk (Tr. 128). They met for about 10 minutes (Tr. 1284) whereupon he left and they returned to their car where Barbara showed her some money (Tr. 1285). She took a second trip a couple of weeks later to 79th and Western to a restaurant and sat together. Later the man arrived whereupon she moved away from Barbara over to a table (Tr. 1286). Barbara was at the counter (Tr. 1287). She identified Sonny in Court as the man they met (Tr. 1287). They met for 10 minutes, but she did not hear the conversation (Tr. 1288). When they left, Barbara did not show her any money (Tr. 1289).

The third meeting was at 87th and Cicero at Dominicks and was a week or more after the second (Tr. 1289). They parked in the lot and 10 minutes later a car pulled up next to them (Tr. 1282). There were two men in the car and although it was dark out, she could see it was the same man (Tr. 1292). Barbara entered the other car, sitting in the rear seat. She could not hear what was said and shortly thereafter Barbara returned to their car and showed her some money (Tr. 1293-1294). Barbara used the money to bail Howard out of jail (Tr. 1294).

On the cross, she testified that Howard was still in custody at the time of the first meeting and they did not go to the jail to see Howard that day (Tr. 1316). At the Grand Jury, she had said at the second meeting she said she sat at the counter and could not remember whether Barbara and the man were inside or outside the restaurant (Tr. 1322). Miss Thompson was sure Howard was still in jail at this second meeting (Tr. 1325) and she was sure all three meetings encompassed at least a three week period (Tr. 1327). Howard was still in jail at the third meeting (Tr. 1333) and when they went to see the lawyer (Tr. 1335). She first spoke with the government just before the Grand Jury appearance which was June 24, 1981, five years after the event (Tr. 1337-1338). She never spoke to Howard or Barbara about her testimony although she sees them regularly (Tr. 1338). Barbara never told her the government had contacted her about these meetings (Tr. 1340). She never saw the man before or after these meetings and each was of short duration (Tr. 1342). Since the last meeting in 1976 until her testimony in Court, she never saw the man she identified (Tr. 1344). She could not recall if the man she saw in 1976 had a mustache, but Sonny does not have a mustache (Tr. 1346). No photos were shown her at the Grand Jury and she never made an identification of the man in her Grand Jury testimony (Tr. 1346). Miss Thompson was asked whether the government had shown her pictures to attempt an identification and she responded

yes, they showed her a book of pictures (Tr. 1347). Upon receiving the surprise answer an immediate side bar was requested and it was put of record again that no 3500 material was furnished regarding a photo lineup (Tr. 1350). A voir dire examination regarding any suggestive identification issues ensued (Tr. 1353) but the Court found no constitutional violation.

Barbara Jackson testified that (Tr. 1414-1) on July 26, 1976, she was at home when Howard was arrested (Tr. 1414-2). She met with him at 11th and State that same night after he called her from the police station (Tr. 1414-3) and talked in the presence of Officer Williams for 1½ hours (Tr. 1414-3). Waide told her to contact Sonny and gave her a piece of paper with a telephone number and his I.D. to show Sonny (Tr. 1414-4). She contacted Sonny and set up a meeting at a shopping center at 79th and Harlem (not at 159th and Kedzie) near the K-Mart (Tr. 1415-7). She went there with Jean Thompson and they entered the K-Mart after the man had already entered (Tr. 1414-8, 1414-9). She met with the man and showed him the I.D. with Howard's picture on it (Tr. 1414-10). She identified Sonny as the man she met (Tr. 1414-11). She asked the man for money to help Howard and he said he had nothing to do with the arson, but would help Howard (Tr. 1414-12). He gave her some money but she never counted it because it was in an envelope (Tr. 1414-13). Two or three weeks later, she met him again at 79th and Western at a restaurant per instructions from Howard to get some more money (Tr. 1414-15), and again she went there with Jean Thompson (Tr. 1414-16). They sat at the counter and when the man entered, she and the man sat at a table and talked while Jean stayed at the counter (Tr. 1414-16). (Vice-versa per Thompson's testimony). She told him Howard needed more money and she thought he gave her some more and he said it was the last time he wanted to be contacted (Tr. 1414-16). The third meeting occurred at 87th and Cicero at Dominicks two or three weeks after and again she went with Jean

Thompson (Tr. 1414-21). It was dark out this time, she got into a car with the man and received some more money (Tr. 1414-22, 1414-23). She never counted this money and gave it all to the lawyer. She never gave any of the money to Howard (Tr. 1414-25). She then identified the photographs she was shown in the photo lineup (Tr. 1414-26).

On cross, she testified that this third meeting occurred six or seven weeks after the first meeting sometime in August or September, 1976 (Tr. 1414-28). The second meeting was at least two or three weeks after the first one, and she was sure Howard was still in custody at the time of the second meeting (Tr. 1414-55, 56). Later she stated that Howard was on bond at the time of the second meeting, but she, not Howard, went because neither he nor Sonny wanted any direct contact (Tr. 1414-58, 1414-59, 1414-69). She never met Howard at the Criminal Court Building (Tr. 1414-57) and never went to meet the man at 159th and Kedzie (Tr. 1414-48). She never mentioned three meetings to the agents and never mentioned the restaurant at 79th and Western (Tr. 1414-63). She remembered this meeting only after talking to Jean Thompson and finding out that she had told the agents of three meetings. She changed her testimony on June 24, 1981, when she went to Grand Jury in the company of Jean Thompson and they discussed it (Tr. 1414-98, 99, 100).

Howard was a frequent liar and often distorted the truth leaving much out of what he related (Tr. 1414-72). She knew he was involved in arsons and that he had been arrested for arson at least two times prior to the Bull and Bear (Tr. 1414-74). He lied to her about the 1971 arson arrest (Tr. 1414-74). She acknowledged that in her statements and Grand Jury testimony, she said the first time she saw Howard after the arrest was one week later, where he discussed with her going to see Sonny and he gave her the I.D. and phone number (Tr. 1414-81, 82, 83). Her testimony now was different. In her earlier statements, she

described the man she met as having a mustache and her recollection now is that he did in fact have a mustache (Tr. 1414-87). Neither Sonny nor his photo had mustaches (Tr. 1414-87). In her earlier statements, she said she did count the money and it contained $1,000 in cash in $100s, $50s and $20s (Tr. 1414-88). That was correct and she was wrong on direct. She did count it before she gave it to the attorney and it was $1,000 (Tr. 1414-90). Although she claimed the money from Sonny was not for bond, but was for attorney's fees, her earlier statements said the second meeting was to get more money for bond (Tr. 1414-92) and again this earlier statement was correct and she was wrong on direct testimony (Tr. 1414-93). She stated that what she referred to as the second meeting in those st ements was really the third meeting at 87th and Cicero because at that time she had forgotten about the second meeting at 79th and Western. So the meeting she was referring to was the one six weeks after the arrest (Tr. 1414-92, 93). She then changed her whole direct testimony and stated she was wrong, Howard was still in custody during these meetings. After the agents had her identify the photos, she immediately called Jean Thompson and told her she had initialed a photograph and that the agents were on their way there for her to do so (Tr. 1414-21).

Miss Jackson said she did not know the address of the Bull and Bear because she had never been there (Tr. 1414-114). She was shown a copy of her handwritten statement and was referred to a portion of that statement where she had written in the address 111 West Jackson Boulevard (Tr. 1414-114). It was also then pointed out that the address was absent from the typewritten version of the statement (Tr. 1414-114). She stated she knew the address in 1979, but only because the Bull and Bear had burned down in 1976, and had never reopened. She could not explain the fact that in 1979 she still knew the precise street address of the restaurant (Tr. 114-115).

James Ruissis testified that he was an accountant specializing in restaurants and did the bookkeeping and account-

ing for the Bull and Bear (Tr. 1048). He identified all the financial documents and exhibits as the books and records of the Bull and Bear (Tr. 1048-1055). For fiscal year, 1973, the Bull and Bear lost $47,144.37 after depreciation (Tr. 1061). For fiscal 1974, they lost $32,909.94 after depreciation (Tr. 1062). For fiscal 1975, they made a profit of $1,558.70 and for the first four months of 1976, they lost $24,927.79 (Tr. 1063). On cross, he termed them as paper losses for 1973, 1974, and 1975 and without the depreciation and amortization write offs, there were small profits (Tr. 1077-1078). Most restaurants operate with paper losses (Tr. 1079). In addition to an already heavy debt structure $35,000 in additional improvements were made by the Xhekas in 1975 and this substantially contributed to the loss and cut into profits about $17,000 per year (Tr. 1091). As for 1976 figures, the downtown restaurant business was cyclical and these months were traditionally poor months (Tr. 1086). Also the Bull and Bear was a cash basis taxpayer and any large expenditures during those months would distort the profit picture and indicate a substantial loss for that period, only to balance out later in the year when expenditures were lighter (Tr. 1090-1091). There were no cash flow problems and all debts, bills and taxes were being paid and serviced out of current receipts (Tr. 1083). The drop in employees at the Bull and Bear occurred when Swifts moved out of the building and closed the 18th floor restaurant for their employees run by the Bull and Bear (Tr. 1087).

Peter Kilchelman testified and he is an attorney (Tr. 1100) and handled litigation between the building and the Bull and Bear over the lease in 1975-1976 (Tr. 1101). There were three separate leases covering the various areas of the Bull and Bear and total rent was $5,106.50, per month plus escalation rent (Tr. 1102). The escalation rent for 1975 was due in May 1976 and was not paid in the amount of $9,690.91 (Tr. 1102) and the August rent was not paid (Tr. 1103). The escalation rent was ultimately paid,

but the monthly rent went to suit and was ultimately settled (Tr. 1104). At the time of the fire the monthly rent was current and only the escalation was due (Tr. 1108) and the amount billed was only $4,831 for 1975 and was erroneously sent to Emil Cole and not the Bull and Bear in May. The lessor did not fix the premises as called for by the lease until November, 1976 and really the Bull and Bear did not owe rent on those damaged premises until that was done (Tr. 1176).

(At this point the transcript returns to page 1415 the voir dire of Howard.)

On the voir dire, Howard saw Callas six months after the fire (Tr. 1418) and he saw Callas a number of times at the Peanut Barrel between 1976 and 1979 taped conversation (Tr. 1418). They never talked about the fire, money, or the insurance proceeds on any of these occasions (Tr. 1418). They probably talked about his arrest, but he never discussed the Xhekas with Callas (Tr. 1419). Howard also saw Callas at the Electra Lounge a number of times before 1979 and again never discussed any aspects of the fire with him (Tr. 1420-1421). There were at least six or eight meetings (Tr. 1425). Callas knew of his arrest because it was common knowledge (Tr. 1422). Insurance proceeds were never discussed (Tr. 1426) and were first discussed when Howard brought it up on the tape recording (Tr. 1427). The first mention regarding the "couple of bucks" since 1976 was the taped conversation and Callas never asked for nor inquired about his money in the interim (Tr. 1427-1428).

Agent Gorecki was then recalled to testify regarding his wiring up Howard for the July 1979 taping and the chain of custody of the tape recording and cassette copies thereof (Tr. 1458-1462). He admitted on cross examination that on a number of occasions, Howard lied to the investigating officers (Tr. 1499).

Wadie Howard was recalled to testify to the circumstances surrounding his taped conversation with Callas and

thereafter the tape itself was played for the jury a number of times (Tr. 1430-1439). Thereafter certain stipulations were read and both sides agreed that all impeachment concerning prior inconsistent statements were perfect, as if the party taking those statements were called to testify to the statements contained therein (Tr. 1515). The government then rested.

The first defense witness was Nick Kotsimitis who purchased and owned Zorba Lounge from 1973 to 1975 (Tr. 1532). On July 1, 1976, he did not see Howard and Callas at Zorba's because that would have been impossible since Zorba's was closed and the building was demolished in November or December of 1975 (Tr. 1533-1534). Chris Callas worked at Zorba's prior to 1973, before Nick bought Zorba's but had not worked there since Nick bought the place (Tr. 1534).

Nick knows Wadie Howard and met him in early 1974, right after he bought Zorba's (Tr. 1535). In early 1976, on a couple of occasions, he came into DeMars to see Nick and asked him if Nick was interested in torching the Peanut Barrel (Tr. 1536-1537). Howard said that if he would come up with some money, Howard would do the job (Tr. 1537). The Callas' owned the Peanut Barrel. Howard was a professional arsonist who frequently told Nick how to start fires, burn down restaurants, transport gasoline and things like that (Tr. 1540). On one occasion, Howard told Nick he went all the way to Canada to torch a place (Tr. 1541). Howard also told him he torched a place in Waukegan (Tr. 1555). Nick said you can tell the way a guy talks when he is a professional and he knew Howard was a professional and for that reason was afraid of him (Tr. 1555). He would never go to the police on Howard because of this fear and the police would not help him when Howard got him in the alley to beat his brains out (Tr. 1555). Howard got him for $120. He did not have to threaten, he was very persuasive just by looking at you (Tr. 1555).

The final important defense witness was Imaculotta Baki, who testified that from January 1976 and July 1976, she was the bookkeeper for the Bull and Bear and worked downstairs in the manager's office (Tr. 1658). She worked five days a week 9:00 a.m. to 5:00 p.m. except Tuesday she worked 9:00 a.m. to 8:00 p.m. (Tr. 1659). At the time that she also worked one Saturday per month (Tr. 1659-1660). During the weekdays she would work from 9:00 a.m. to 11:00 a.m. in the manager's office and at 11:00 a.m. she would go upstairs until 2:00 p.m. to help the hostess with the lunch traffic (Tr. 1660). After 2:00 p.m. she would go back downstairs to the office and resume her bookkeeping until 5:00 p.m. In addition to Sonny and Billy, Sabri was on the premises every day and they were the owners (Tr. 1661). Billy would come to work around 11:00 a.m., Sonny at 10:30 a.m. and Sabri at 9:00 a.m. (Tr. 1662). The Bull and Bear was open upstairs from 11:00 a.m. to 9:00 p.m. Monday through Friday (Tr. 1663) and the upstairs lounge was never open on Saturdays (Tr. 1663). The LaSalle Street entrance to the upstairs lounge was kept locked on Saturdays (Tr. 1663). On Saturday you had to enter the Bull and Bear through the lobby door, sign in by the security guard and then enter the restaurant (Tr. 1664). When she worked Saturdays, she would arrive at 2:00 p.m. and leave around 4:30 p.m. (Tr. 1664). She recalls working the Saturday before the fire (Tr. 1665).

She never saw a big black man with Sonny or Billy in the office or around the premises (Tr. 1666). She was contacted by the government two years ago, regarding this very thing and she gave them a statement to that effect (Tr. 1666). The government showed her a photograph of a black man who was bald and wore black rimmed glasses and asked her if she recognized him or ever saw him in the Bull and Bear (Tr. 1667). She told them that she never

saw that man in the Bull and Bear and she never saw him before in her life (Tr. 1668). She identified Agent Gorecki as the man she talked to (Tr. 1668). She did not know the Xhekas before her employment and had not seen them since the fire (Tr. 1668). On cross, she stated she knows the meeting with the black man never happened for a fact and not in the manager's office where she worked (Tr. 1672).

Stipulations were then read into the record. Exhibit 9 was the County Jail records showing Howard was released on a $10,000 bond $1,000 cash on July 28, 1976 at 9:30 p.m. on the charges of arson. Exhibit 10 was the arson investigation report ordered by the Trans Union Building showing the fire had three separate disassociated origins (Tr. 1680-1687). Then the defense rested.

REASONS FOR GRANTING THE WRIT

(A)

THE DECISION BELOW CREATES A CLEAR CONFLICT WITHIN THE VARIOUS CIRCUITS OF THE UNITED STATES CONCERNING THE SCOPE OF 18 U.S.C. §844 (i).

Various circuits have split and issued conflicting opinions as to whether common law arson by fire is included within the scope of federal jurisdiction pursuant to 18 U.S.C. §844 (i).

Compare *U.S. v. Agrillo-Ladlad*, 675 F.2d 905 (7th Cir. 1982) (Cites as authority in the case at bar) *U.S. v. Hepp*, 656 F.2d 350 (8th Cir. 1981), *U.S. v. Poulos*, 667 F.2d 939 (10th Cir. 1982), *U.S. v. Hewitt*, 773 F.2d 1381, (11th Cir. 1981), and counter holding in *U.S. v. Gere*, 662 F.2d 1291 (9th Cir. 1981), *U.S. v. Birchfield*, 486 F.Supp. 137 (N.D. Tenn. 1980). Indeed the statute has recently been amended to include the word "fire" and cure the defect raised herein. For this reason, this court should consider this case to clarify the question and remove the conflict.

The 9th Circuit in *Gere* supra correctly perceived the scope of 18 U.S.C. §844 (i) and found federal jurisdiction lacking over common law offenses of arson for profit.

In the case at bar, the government has failed to prove the use or intended use of explosives as contemplated by Congress in enacting the statute. Stated quite simply, while the government may have presented evidence of an arson or attempt arson violative of state statute, it did not prove a violation of 18 U.S.C. §844 (i) and (j).

The defendants were originally charged in Count I with conspiracy to damage or destroy the Bull and Bear Restaurant with the appropriate interstate commerce allegations. Count II of the original indictment charged them with the substantive offense. (C.L. Rec. 1) That indictment was superseded with an identical indictment in the same two counts, except for the addition of the following critical words, omitted in the original indictment:

"by means of an explosive as defined by Section 844(j) Title 18, United States Code."

(C.L. Rec. P. 5)

Hence initially the defendants were charged in classical language with a state arson offense for which there clearly is no federal jurisdiction and there was a later attempt to amend that charge to include allegations which might have brought the defendants conduct within the purview of the federal statute. No specificity or allegations are contained in the indictment setting forth the nature of the explosive device i.e. an incendiary device, or a chemical compound etc., but it is clear in the government's response to the defendants' motion in arrest of judgment and motion to hold in abeyance that they rely on either or both of the above alternatives (CR 118 P. 2).

The evidence in this case offered by the government to support these charges in essence resolves down to the use of gasoline soaked trailers and gasoline poured throughout the premises, and contained in drums for the purpose of rapidly spreading the fire, which was ignited by a hand held cigarette lighter. In this context then the issues presented, based upon the dual theories argued by the government are as follows:

1. Is gasoline used as an accelerant to set a fire, a "chemical compound within the meaning of §844 (i) and (j)"
2. Is a gasoline soaked trailer and/or container an "incendiary device" within the meaning of § 844 (i) and (j)?

For the purposes of § 844 (i) and (j), there is an obvious distinction between arson and the damaging of property by means of an explosive. At common law, arson was merely the malicious burning of the property of another 4 *Blackstones Commentaries*, Section 220. However, states by statute have broadened that definition to include explosives. Consequently, the Illinois Arson Statute provides that a person commits arson who, by means of *fire*

or explosives, knowingly damages any real or personal property.

The federal statutes define arson solely with regard to federal jurisdiction limited solely to territorial considerations. See 18 U.S.C. § 81 and 18 U.S.C. § 1153.

For purposes of the above, arson was limited to the common law definition in that a dwelling house had to be the object thereof. *United States* v. *Cardish*, 143 F. 640, (D.C. Wisc. 1906). By virtue of a 1966 statute, the definition was changed to conform to that of the State within which the Indian lands are located. More recently, the distinct offense of arson was recognized when Congress adopted 18 U.S.C. 1952. In subsection (b), thereof, unlawful activity was defined to include arson in violation of the laws of the State in which it was committed or of the United States.

Thus it is apparent that arson—the *burning* of property is a distinct independent recognized criminal act, with the primary emphasis on the burning. Indeed in the case at bar itself, the activity charged was the subject matter of State prosecutions.

Furthermore, the language of Section 844 (i) and (j) are unambiguous. Arson is to be distinguished from the use of explosives prohibited by §844. The definition of explosive is provided in 18 U.S.C. § 844 (j):

> "For the purposes of subsections . . . (i) of this section, the term 'explosive' means gun powders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electric circuit breaker), detonators, and other detaining agents, smokeless powders, other explosive or *incendiary devices within the meaning of paragraph* (5) *of Section* 232 of title, and any *chemical compounds*, mechanical mixture or device that contains any oxidizing and combustible units, or other ingredients, in *such proportions, quantities, or packing that ignition by fire*, by friction, by concussion, by precussion or by detonation *of the compound*, mixture or device or any part there *may cause an explosion.*" (emphasis supplied).

18 U.S.C. § 232 (5) provides as follows:

> "The term 'explosive or incendiary device' means (a) dynamite or all other forms of high explosives, (b) any explosive bomb, grenade, missile, or similar device, and (c) any incendiary bomb, or similar device, including any device which (i) consists of or includes a breakable container, including a flammable liquid or compound, and a wick composed of any material which, when ignited is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone."

With regard to the dual theory of the government regarding the nature of the explosive involved, a separate analysis of each is necessary. First a chemical compound must contain oxidizing and combustible units, or other ingredients, in such proportions, quantities or packing that ignition by fire may cause an explosion 18 U.S.C. § 844 (j). A plain reading of Section 844 (i)—when viewed in the context of the words and provisions preceding and following—indicates that an "explosive" of this first category must be:

1. A chemical compound, containing
2. an oxidizing or combustible agent
3. already proportioned, mixed or packaged
4. such that ignition by fire may cause explosion.

The question presented on the facts of this case is whether gasoline, in containers or spread on trailers, is the type of chemical compound contemplated.

Admittedly, gasoline is a chemical compound. However, there is no evidence in this case that gasoline contains an oxidizing or combustible agent. Furthermore, the stipulation in this case concerning gasoline and its properties clearly indicates that something must be permitted to occur to gasoline to cause it to have explosive properties i.e. it must be permitted to mix with air and generate fumes in a certain ratio before there could be an explosion. A container of gasoline all by itself is not an already proportioned, mixed or packaged compound which may ex-

plode on contact with fire as set forth in 3 above. Gasoline alone in containers will not ignite or explode.

It may arguably be asserted that the proportioning or mixing required may be attained by spreading the gasoline on the trailer. However, this type of spreading or pouring is not really a proportioning mixing or packing as those terms commonly denote or contemplate and this extention in interpretation was clearly not contemplated by the definition. This argument becomes even weaker when viewed in the context of those explosives specifically named in the statute. The common characteristics of those named are transportability and detonation as contrasted to a 55 gallon drum which is immobile, not readily detonable but subject merely to a rapid flame. In the case at bar, the evidence clearly demonstrated that the gasoline drums were merely utilized for transportative purposes to bring the gasoline into the premises, and thereafter pour gasoline from them to soak the premises for acceleration of a fire. In fact, the drums were turned over to allow their contents to spill out and saturate the floor area. Neither drums were set up to explode or detonate.

Arguably, however, the meaning of "a chemical compound" within the definition elements 1 through 4, concerning specifically numbers 3 and 4 regarding . . . "in such proportions quantities or packing that ignition by fire . . . . may cause an explosion" is unclear and ambiguous when viewed in the context of gasoline spread on trailers. The Ninth Circuit in the *United States* v. *Gere* resolved that ambiguity concerning photocopy fluid by searching Congressional intent and determined that photocopy fluid soaked trailers were not chemical compounds nor incendiary devices within the statute. This has been extended to gasoline in *United States* v. *Birchfield*, 486 F.Supp. 137, (1980). Therefore, we shall likewise concentrate in this Petition in clearing up any such ambiguity by a study of Congressional intent and legislative history concerning the history and passage of the legislation and

the Organized Crime Control Act. Title XI of which it is a part.

However, the second governmental theory is more easily disposed of on clear definitional grounds and will be disposed of before an in depth inquiry into Congressional intent. In Section 844 (j), the term, "incendiary device" is modified by the phrase "within the meaning of paragraph (5) of Section 232 of this title". Therefore, to determine what an incendiary device is, one must look to Section 232 where three separate categories are itemized as follows:

(a) dynamite and high explosives;

(b) any explosive bomb, grenade, missile or similar *device;* and

(c) an incendiary bomb, fire bomb or similar device which:

(i) consists of a breakable container, including a flammable liquid and wick; and

(ii) is portable.

Here the *plain meaning* of the word "incendiary device" is crystal clear, readily discernible and totally unambiguous. The device may be (a) dynamite or a high explosive. Gasoline contained in drums spread on trailers across a floor does not qualify here, as it is neither dynamite nor a high explosive but a flammable liquid. There is nothing in the working of the statute which would support a theory that flammable liquids capable of explosive force upon ignition are included in the definition of "high explosives".

Secondly, with regard to (b) gasoline in drums or spread on trailers across the floor are not bombs, grenades, missiles, or other similar devices. The clear intent of this provision is to bar portable explosives not immobile large storage containers such as 55 gallon drums. Nor can it be argued that the general term "or similar devices" can be inclusive of such as the gasoline soaked trailer or storage drums. Under the doctrine of *ejusdem generis*, general words such as "or similar devices" following

specific definitional terms take their meaning from and are limited by those specific terms. *United States* v. *Baranski*, 484 F.2d 556, 566 (7th Cir. 1973). Thus bombs, grenades, or missiles clearly circumscribe, delimit, and define anything inclusive within the term "or similar devices".

Finally, gasoline drums and gasoline soaked trailers are clearly not an incendiary bomb, fire bomb, a similar device which consists of a breakable container with a wick and is portable. The intention of the definition here is clearly and singularly a device thrown such as "Molotov Cocktail". See *United States* v. *Gere*, 662 F.2d 1291 (1981). There is no reasonable or justifiable interpretation of the facts here which would justify the conclusion that an "incendiary device" was utilized in the case at bar or support the government's second theory concerning applicability of the statute.

Furthermore, it should be noted here that although the government relied on the theory "incendiary devices" on the motion in arrest of judgment, they never submitted the theory to the Court or jury during trial. They solely relied upon the "chemical compound" theory of statutory applicability. This can be seen by the instruction submitted to the jury on this issue wherein explosives is defined only in terms of the single theory of "chemical compound". (C.I. 102).

Any possible governmental argument on this issue concerning an "incendiary device" in the case at bar was amply considered and rejected in *United States* v. *Birchfield*, *supra*. On facts very similar to those in the case at bar, the District Judge in dismissing charges under this statute said:

> "This Court accepts the defendant's argument that throwing paper onto a gasoline-soaked floor fails to constitute the use of an explosive as contemplated by 18 U.S.C. § 844(i). The Court will take judicial notice that the form of destruction described in paragraph 1 of the indictment is a very common means of arson,

> and in absence of clear statutory language or a compelling legislative history, this Court must assume that Congress, in enacting 18 U.S.C. § 844, did not intend to exert federal jurisdiction over this traditional area of state concern."

Any such extension would fly in the face of Congressional intent and executive enforcement and any ambiguity in the scope and application of § 844 (i) and (j) is removed by a review of that intent and enforcement. As indicated above, it may be argued that the scope of the statute and Title XI, as well as the meaning of the term "chemical compound" might involve some ambiguity. Therefore, it is appropriate to look at and analyze legislative intent. This intent can best be found in 1970 *U.S. Code Cong. and Adm. News*, and in the statements and comments made by the various legislators during debate on the legislation.

In 1970 *U.S. Code Cong. and Adm. News*, p. 4011, it is stated:

> "This title (Title XI), added by the committee, established Federal controls over the interstate and foreign commerce of explosives and is designed to assist the States to more effectively regulate the sale, transfer and other disposition of explosives within their borders.
>
> In addition to the Federal regulatory scheme, Title XI strengthens the Federal criminal law with respect to the illegal use, transportation or possession of explosives. Under this part of the title, the definition of explosives is broadened to include incendiary devices such as 'Molotov Cocktails'."

The congressional intent in adopting Title XI is stated as follows:

> "Bombing and the threat of bombings have become an ugly, recurrent incident of life in cities and on campuses throughout our Nation. The absence of any effective State or local controls clearly attest to the urgent need to an act strengthened Federal regulation of explosives. 1970 *U.S. Code Cong. and Adm. News*, pp. 4013-4.

Further in the section analysis, and regarding the definition of explosives as found in Section 844(i), it is stated:

> "Section 844(j) sets forth the definition of explosive, for the purposes of Section 844(d) through (i). The use of the separate definition is for the purpose of including incendiary devices within the coverage of Section 844(d) through (i), and to make the exceptions applicable to the regulatory provisions of this chapter inapplicable to these sections." 1970 *U.S. Code Cong. and Adm. News*, 4047

A perusal of the Congressional record and reading of the statements of the legislators during debate is even more helpful in removing ambiguity and supporting the appellants' contention that federal jurisdiction is absent in the case at bar. (116 Cong. Rec. 1298 et seq. 35306). All the speakers addressing the issue in debate singularly manifest an intent to avoid the area of arsons and concentrate solely on bombings and traditional explosives.

From the foregoing, it is clear that the intent to Congress in enacting this legislation was singularly confined to bombings and the use of explosives in connection therewith. There was no indication or discussion whatsoever to extend federal jurisdiction to arson and/or arsons for profit. No discussion whatsoever resulted concerning an extention of explosives to be inclusive of flammable liquids, accelerants, gasoline or the like commonly used in the offense of arson. The very inclusion in the act of "Molotov Cocktails" specifically indicates an exclusion of the substances in the case at bar, for before the amendment to specifically include such devices, even such fire bombs were felt by Congress to have been excluded. Thus it is apparent that Congress never intended this legislation to be extended to encompass arsons or the burning of property for profit by use of gasoline type accelerants.

Under the doctrine of Separation of Powers Federal Courts must avoid legislating in interpreting Federal statutes beyond their intended and plain scope. To that end the intent of Congress in enacting such legislation has

always been and must be considered and respected by the Courts. The Federal Courts should not interpret a statute in such a manner as to strip it of its meaning, but rather should look to the statute as written and give it the same meaning that was intended by Congress at the time of its enactment. This Court has held that it is the sponsor of the legislation to whom we look when the meaning of statutory words are in doubt. *National Woodwork Manufacturers Assoc.* v. *National Labor Relations Board*, 386 U.S. 612, 640 (1967). This Court has similarly held that it would look to the understanding of others in a debate and if the words used in a statute were different than protrayed by the speakers during debate, others would have spoken to the contrary.

On the other hand, what legislators *do not* say during debate is likewise of great import. *Rewis* v. *United States*, 401 U.S. 808, 811 (1970). The singular thing which was not said during these debates on the legislation is the mention of the term "arson" or any intent to alter the state-federal balance between what has heretofore traditionally been left to state prosecution. None of the many statistics cited throughout the debates included the more common crime of arson.

Current events at the time of the legislative enactment are likewise relevant to a resolution of this issue. *Holy Trinity Church* v. *United States*, 143 U.S. 457. The singular important current event acting as a catalyst for the passage of the legislation was a current rash of bombings at the University of Wisconsin and the death of a professor there.

Finally, it has been universally accepted that ambiguity concerning the scope and applicability of federal criminal statute is traditionally resolved in favor of limited and restricted application. *Rewis* v. *United States*, supra at p. 812. *United States* v. *Campos-Serrano*, 404 U.S. 293, 297 (1971); *United States* v. *Bass*, 404 U.S. 336, 347

(1971); *U.S.* v. *Batchelder*, 481 F.2d 626, 630 (7th Cir. 1978); *U.S.* v. *Isaacs*, 493 F.2d 1124, 1147 (7th Cir. 1974).

In analyzing which of the two or more interpretations to attach to an ambiguous statute, the factor of the Federal-State balance comes into play. In *United States* v. *Bass*, 404 U.S. 336, 349, the Court discussed this as follows:

> "There is a second principle supporting today's result: Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance. Congress has traditionally been reluctant to define as a Federal crime conduct readily denounced as criminal by the States. This Congressional policy is rooted in the same concepts of American Federalism that had provided the basis for judge-made doctrines. (case cited)

Hence, statutes should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress. Moreover, such construction is especially appropriate where as here, the Government urges that we construe a Federal criminal statute so that it reaches conduct which the states should appropriately control and which they can control, effectively.

Another consideration in resolving this issue is the historical interpretation attached to the legislation by the executive branch of government and particularly those therein whose function and duty is to enforce its provisions. In this regard, it is significant to note that four other known cases exist wherein the government has attempted to extend this statute to a situation wherein an accelerant was spread through a building and then ignited traditionally akin to the state offense of arson or arson for profit.

In conclusion, the Court below has erred in denying the motion in arrest of judgment concerning the question of federal jurisdiction and the scope of § 844 (i) and (j), gasoline in drums, poured on materials or flooring, or soaked on trailers, does not fit into the category of chemical

compound within § 844(j). Nor does this qualify as within the meaning of an incendiary device under § 844 (j) or § 232(5). This conclusion is further supported by the Congressional record (both by what was said and unsaid); current events surrounding the passage of the legislation during 1969 and 1970 which caused Title XI to be added to the Organized Crime Control Act, and finally by its implementation by the Justice Department throughout the country. For these reasons this Court should grant the writ.

(B)

THE COURT ERRED IN HOLDING THE CONSPIRACY OPEN AND ON-GOING BECAUSE INSURANCE PROCEEDS HAD NOT BEEN RECOVERED AND ALLOWING THE CO-CONSPIRATORS TAPE INTO EVIDENCE AGAINST THE NON-PRESENT DEFENDANT.

In this case the trial court made a judicial determination that a certain tape recorded conversation between the named, but unindicted, co-conspirator, Wadie Howard, and the defendant, Chris Callas, on July 18, 1979, was admissible evidence of the conspiracy and substantive offense as to all the named defendants. In making this decision, the trial court considered the holding in *United States* v. *Santiago*, 582 F.2d 1128 and applicable rules of evidence, 801(d)(2)(E), 104(a) and 403.

Rule 801(d)(2)(E) provides in pertinent part,

> "A statement is not hearsay if . . . . the statement is offered against a party and is . . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

The preponderance test was adopted as an appropriate basis in determining whether a conspiracy has been proven so as to authorize the admission of co-conspirative statements under Rule 104(a). In elaborating on this principle, Courts have set forth and established certain requirements which must be fulfilled, by a trial court when confronted with the issue of admissibility of a co-conspirator's statement. The question of admissibility is solely for the judge,

and statements in a criminal case are to be admitted against the defendant, once the Government has established by a preponderance of the evidence, *independent of the statements themselves*, (emphasis added) 1) that a conspiracy existed, 2) that the defendant was a member of the conspiracy, and 3) that the statement was made during the course of, and in furtherance of, the conspiracy. It is important to note that these determinations must be made by the court independent of the statements themselves.

In the case at bar, the court struggled long and arduously with the issue of admissibility relative to the tape recorded conversation between Wadie Howard and Chris Callas (Tr. 445-53, 481-505, 506-548). This was in the court's own mind, a very close question (Tr. 1298, 1299, 1446). After having vacillated numerous times in ruling on this issue after having heard endless theories advanced for admission by the prosecutors, after listening to argument by defense counsel refuting the legal and factual basis upon which each theory was predicated, and after having ruled for and against admission on more than one occasion, the court finally asked the prosecution, in exasperation and apparent frustration, whether it was going to persist in offering as evidence the taped conversation and risk reversal if the court's determinations were erroneous (Tr. 1446). The prosecution's immediate response was "Yes, absolutely, Your Honor," by Mr. Evon, and simultaneously, "Yes, we do, Your Honor," by Mr. Mars (Tr. 1446). These anxious responses affirming the desire for admission of this evidence clearly is indicative of its critical importance in the prosecution of this indictment in the opinion of the Assistant United States Attorneys conducting the trial. The testimony of the Government's key witness, Wadie Howard, was unquestionably weak as to the conspiracy and to the participation of certain defendants. His credibility, veracity and believability, presented an even greater concern to the prosecution. This problem, however, was not unexpected but was anticipated as far

back as July 1979. In point of fact, the agents of the Alcohol, Tobacco and Firearms Unit of the Department of Justice in combination with attorneys assigned to the United States Attorney's Strike Force set out in their investigation not necessarily to unearth the truth, but to corroborate Wadie Howard's version of what had occurred and transpired thereby incidentally insulating his testimony from attack and impeachment. Prime examples of their concerted, conscious efforts to bolster the weak link in the prosecution's chain of evidence is the arranged tape recorded conversation initiated and manipulated by Wadie Howard, and their refusal to disclose to defense counsel certain Brady-type evidence in relation to witnesses they interviewed who contradicted and refuted Wadie Howard.

Agent Gorecki candidly stated that Wadie Howard was sent out to engage Chris Callas in conversation and told to get out of him anything he could (Tr. 1480). The sole purpose of this conversation was for Howard to entrap Callas into admissions and incriminating statements implicating himself, and the Xhekas. However, the substance of the conversation reveals awkward efforts by Wadie Howard to elicit incriminating statements, with a rather remarkable lack of success. The tape is of very poor quality, at times totally inaudible and the listener is unable to discern who is speaking, to whom, and what is being said. However, the prejudice of this tape recording was recognized by the court at the outset of the trial. While denying the defense's Motion in Limine requesting a pretrial hearing for determination of the issue of admissibility, the court stated that the taped conversation was potentially prejudicial to all of the defendants (Tr. Vol. IA, p. 38) and cautioned the Government to structure the proof so that the court would be in a position to make the admissibility in advance. Contemporaneously thereto, the court indicated that the probative value of the recorded conversation was unimportant to the Govern-

ment's case (Tr. Vol. IS, p. 37). This observation was astutely and correctly made from a purely evidentiary point of view. Later, however, during the actual presentation of evidence, it became apparent the recording and conversation were increasingly significant and important as a strategical trial device calculated by the prosecution to be relied upon by the jury as enhancing the credibility of Wadie Howard, and thereby strengthened his otherwise weak testimony.

The trial court is charged with the sole responsibility for making the crucial ultimate determination of admissibility. This decision obviously affects the jury's deliberations and considerations relative to the guilt not only of the declarant, but also his alleged co-conspirator defendants. This discretion should be exercised with great caution and due consideration of the limitation and the statements must have been made "during the course of" and "in furtherance of" the conspiracy. The court should also be convinced that the conspiracy, more probably than not, existed and all the other alleged co-conspirator defendants were, more probably than not, members of and participated in the conspiracy. These limitations and determinations are useful devices for the protection of defendants from the dangers and unfairness posed by Rule 801(d)(2)(E). The purpose of said Rule being to protect the accused against the idle chatter of criminal partners as well as inadvertently misreported and deliberately fabricated evidence. Weinstein on Evidence, pp. 801-845.

In this case it can be logically admitted that the evidence presented by the prosecution, independent of the taped conversation itself, taken in its most favorable light, sufficiently established by a preponderance, the probable existence of an initial conspiracy. The question, however, whether there was sufficient independent evidence of the defendant, Billy Xheka's knowledge or participation in the conspiracy; whether the conspiracy continued until 1979; and whether there was sufficient independent evi-

dence that the recorded conversation was made during the course of and in furtherance of the continuing conspiracy, cannot be logically so concluded and were not determined, as required, by the court on independent evidence.

It is a well settled principle of law that once a co-conspirator has been arrested, a confession or admission made, is not in furtherance of the criminal conspiracy, *Fiswick* v. *United States*, 67 S.Ct. 224, and that an out of court declaration made after arrest may not be used at trial against any of the declarant's alleged partners in crime, *Wong Sun* v. *United States*, 83 S.Ct. 407. Likewise, in the case at bar, the statements of Wadie Howard in the taped conversation of July 18, 1979, were of no probative value in determining the guilt of Sonny Xheka, Billy Xheka and Chris Callas, because at the time made, he was no longer a co-conspirator but a Government informant. The Government at no time argued or sought admission of the 1979 recorded conversation based upon an adoption of Wadie Howard's statement by Chris Callas under Rule 801(d)(2)(B). It is, therefore, only the 1979 conversation of Chris Callas which the trial court should have determined to be of probative value and made during the course of and in furtherance of a continuing conspiracy. Upon review of the propriety of this determination and fulfillment of the admissibility requirements an acquittal of the declarant, Chris Callas, is relevant and may be persuasive in determining whether the prosecution's evidence independently demonstrated a sufficient basis upon which the trial judge concluded a continuing criminal conspiracy.

Not all statements made by alleged co-conspirators can be considered to have been made in furtherance of the charge conspiracy. *Fiswick* v. *United States*, *supra*. Mere conversation between conspirators or merely narrated declarations are not admissible as declarations in furtherance of the conspiracy, since they cannot meet the condition for admissibility which is that the statements must further the objectives of the conspiracy. The agency theory

of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established, *Advisory Committee's Notes to Proposed Fed. R. Evid.* 801(d)(2)(E).

It is certain that the exception applies only to declaration made while the conspiracy charged was still in progress, *Anderson* v. *United States*, 94 S.Ct. 2253, *Krulewitch* v. *United States*, 69 S.Ct. 716, *Fiswick* v. *United States, supra*. It is reversible error to admit such declarations after termination of the conspiracy. *Krulewitch* v. *United States, supra*.

The indictment in this case alleges as the object of the conspiracy charged that the Bull -N- Bear Restaurant, Inc., would be damaged and destroyed by fire. The arson was therefore the criminal joint venture of the co-conspirators and the result to be attained by their preconcert, connivance, criminal intent and overt acts. It was to the proof of this end and that the prosecution presented its evidence. Secondarily, and as auxiliary objects the indictment charged concealment of the true circumstances surrounding the burning and the attempt to receive insurance proceeds. The Government presented absolutely no evidence of the alleged conspiracy to conceal and the only evidence, if relevant or probative, at all of an attempt to receive insurance proceeds is the exhibited lawsuit filed by the Bull -N- Bear Restaurant, Inc., against National Union Fire Insurance Company. The inclusion of these subsidiary objects after the main purpose of the conspiracy had been accomplished, is an attempt by the prosecution in its pleadings to exten the life of the conspiracy a sufficient period of time to bolster its otherwise weak case with the tape recording.

The taped conversation took place on July 18, 1979, almost three years to the day after the arson, since Wadie Howard had seen Billy Xheka, and had seen or talked to Sonny Xheka. This conversation was contrived by the Government and initiated by Wadie Howard who had seen

and spoke to Chris Callas on more occasions that he could accurately remember since July of 1976. It is important to note that in none of these numerous previous conversations was the subject of the Bull -N- Bear Restaurant fire, Sonny or Billy Xheka, concealment of the true circumstances of the Bull -N- Bear Restaurant fire, money, or insurance discussed or even mentioned, by either Wadie Howard or Chris Callas. Wadie Howard testified he had no expectation of receiving any more money and he had, in fact, been paid in full as agreed. He further testified his agreement was not predicated upon any insurance recovery and that he never intended to give Chris Callas any money, nor did he believe Chris Callas expected to receive any money from him. Are the actions of Sonny Xheka, Billy Xheka, Chris Callas, and Wadie Howard during the years 1977, 1978 and 1979 those of co-conspirators engaged in a continuing criminal enterprise? What independent proof is there of a continuing criminal conspiracy? The trial court found none other than the controversial tape recording itself and the unintelligible, undiscernible, sometimes inaudible statements it contained. (Tr. 445-13, 21, 22, 23, 26, 27, 28, 29, 31, 32, 484, 487, 532, 1042, 1208, 1214, 1215, 1443, 1444, 1445, 1446, 1452). The total reliance by trial court on the contents of the taped conversation itself in making the required determinations under the *Santiago* decision was error. While it is necessary to consider the content of the declaration or statements themselves for purposes of relevancy, the issue of admissibility must be resolved based upon sufficient independent evidence that at the time the statements and declarations were made, the criminal conspiracy continued to exist, the defendants, including Billy Xheka, were members of it, and the declarations and statements were made "during the course of" and "in furtherance" of the continuing conspiracy.

Though the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuous one. *United States* v. *Irvine*, 98 U.S. 450. *Fiswick* v. *United*

States, supra. Continuity of action to produce the unlawful result and "continuous cooperation of the conspirators to keep it up is necessary". *United States* v. *Kissel*, 218 U.S. 601. *Fiswick* v. *United States, supra.*

It is quite obvious from the arguments and theories advanced by the prosecutors that the purpose of alleging as subsidiary conspiratorial objects concealment and insurance, was an attempt to extend the time within which hearsay declaration of Chris Callas would bind the alleged co-conspirator defendants, Sonny and Billy Xheka. An attempt which the trial court sanctioned by allowing their admissibility. It is equally clear that the limited scope of the hearsay exception in federal conspiracy trials is a product of this Court's "disfavor" of "attempts to broaden the already pervasive and wide sweeping net of conspiracy prosecutions", *Grunewald* v. *United States*, 77 S.Ct. 963; *Dutton* v. *Evans*, 91 S.Ct. 210.

Conspirators about to commit crimes always expressly or implicitly agree to collaborate with each other to conceal facts in order to prevent detection, conviction and punishment. An argument that even after the central criminal objective of the conspiracy has succeeded, an implicit subsidiary phase, which has concealment as its sole objective, survives, cannot be accepted in even those situations where the actual agreement to conceal was charged as an express part of the initial conspiracy, *Grunewald* v. *United States, supra.* To adopt such an argument would sanction and create automatically a further breach of the general rule against the admission of hearsay evidence, *Lutwak* v. *United States*, 73 S.Ct. 481. *Krulewitch* v. *United States, supra.*

The holdings of this Court in *Krulewitch*, *Lutwak*, and *Grunewald* can be analogized to the circumstances of this case. The inclusion of insurance proceeds together with concealment as subsidiary objectives is a dual pronged attempt to attain the same end. The rationale of these

decisions if logically applied compels the same result. There is no remarkable dissimilarity between the concepts, conspiracy/concealment and arson/insurance proceeds, as they relate to each other in this case. The latter are the natural consequence and flow as direct results. Insurance proceeds are the aftermath of an arson for profit scheme, which is how this case was characterized for the jury (Tr. 1-8). The obtaining of insurance proceeds in an arson for profit scheme necessarily presupposes and is part of the concealment. As in *Grunewald*, the Government is merely rearranging the argument that the continuing conspiracy to receive insurance proceeds should be implied out of the mere fact of the conspiracy to damage and destroy by fire the restaurant. This argument requires that the very same acts should be used as circumstantial evidence from which it should be inferred that there was from the beginning and continuing until July 18, 1979, an actual conspiracy to obtain insurance recovery between all the defendants. As in *Grunewald*, *Lutwak*, and *Krulewitch*, there is not a shred of direct evidence in this record to show anything like an express original agreement among the co-conspirators to continue to act in concert in order to obtain any insurance recovery or proceeds after the commission of the arson in 1976.

In this case it cannot be said with any fair assurance that the jury was not influenced or swayed in its deliberation and verdicts by the use of the hearsay declaration and statements of Chris Callas. In this proceeding such a conclusion is further necessitated and compelled by the poor quality of the tape recording itself. On numerous occasions the court stated it was inaudible, unintelligible, and nondiscernible as to who was speaking and to what was being said and that a dispute existed as to the taped conversation's contents. (Tr. 445-28, 29, 30, 31, 32, 33, 482, 484, 487, 496-500, 505, 548, 549, 1015, 1148). Further proof of the trial court's concern over the ability of the jury to

understand and discern what was said on the tape and by whom, is evidenced by the court's refusal to allow the Government's prepared transcript of the tape conversation to be utilized by the jury as an aid in their deliberation.

In this case, the trial court erred in not exercising proper judicial discretion under Rule 403. The committee comments to Rule 403, recognize that certain circumstances call for the exclusion of evidence which is of questioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. The comments pointed out that situations under this Rule call for balancing the probative value of and the need for the evidence against the harm likely to result from its admission.

In view of the record relating to the admission of this piece of evidence, it is undisputed that a possibility of confusion or the misleading of the jury existed. If a trial judge determines that the proffered evidence presents a danger of confusing the issues or misleading the jury and this danger outweighs its probative value, he should exclude the evidence. It is also without question, a fact, that the entire scenario caused undue delay of the trial and was a needless waste of time which angered the jurors and made them hostile. This occurrence could have and should have been avoided by the trial court in conducting a pretrial hearing as requested by the defense in the Motion in Limine. The trial court again erred in summarily denying this motion and refusing such a hearing.

In the instant case, it was presented to the trial court that whatever probative value the tape recorded conversation offered to the issues requiring determination by the jury, such was far outweighed by the unfair prejudices created to the defendants by engendering confusion, misleading the jury, causing undue delay of the proceedings, and waste of time.

The error of the trial court was further compounded by the denial of the Motions for Severance filed prior to trial. At the time the trial court summarily denied these motions, it had already beeen put on notice of the Government's intended use of out-of-court prejudicial hearsay statements and declarations of Chris Callas against all defendants by the Motion in Limine. As a result of this ruling, the trial court effectively denied the defendants, Sonny Xheka and Billy Xheka, the rights of confrontation and cross examination protected and guaranteed under the Sixth Amendment and the due process standards of the Fifth Amendment to the United States Constitution.

Motions for Severance were filed by all defendants and the trial court was additionally provided with an affidavit executed by Chris Callas in support of the request for separate trials. This affidavit set forth, that Chris Callas could give testimonial evidence of an exculpatory nature as it related to the defendants, Sonny Xheka and Billy Xheka, and further that if called to testify in the trial of either of his two co-defendants, he would not exercise or assert his constitutional rights and guarantees against self-incrimination under the Fifth Amendment to the United States Constitution, but rather give truthful answers to proper questions propounded.

This issue of confrontation and due process was discussed in this Court in *Dutton* v. *Evans, supra.* In that proceeding the issue revolved around the use, by the prosecution, of out-of-court hearsay declarations made by a co-defendant. In dealing with the relationship between the co-conspirators hearsay exception and the Sixth Amendment, the court acknowledged that the confrontation clause does not bar the admission of all hearsay, but has, on more than one occasion, found a violation of confrontation values even though statements in issue were admitted under an arguable recognized hearsay exception. The Sixth Amendment's Confrontation Clause and evidentiary

hearsay rules stem from the same roots, but the two have never been equated. Hearsay rules and the confrontation clause are generally designed to protect similar values, but it is quite different to suggest or hold that the apparent overlap is complete and total insofar as the Confrontation Clause is nothing more or less than a codification of rules of hearsay and their exceptions. An analysis must be made by the trial court or on review to determine whether there existed sufficient indicia of reliability to permit the introduction of the hearsay declarations in spite of the lack of opportunity for the defendant to cross examine the declarant, *California* v. *Green*, 90 S.Ct. 1930. The admissibility of evidence under the co-conspiratory exception does not automatically demonstrate compliance with the Confrontation Clause.

(C)

THE PETITIONERS WERE DENIED A FAIR TRIAL AND DUE PROCESS OF LAW BY THE PROSECUTORS PURPOSEFUL AND REPEATED SUPPRESSION OF FAVORABLE EVIDENCE TO THEIR REFUSE.

This case singularly revolved around the testimony and credibility of Wadie Howard, an alleged co-conspirator. With regard to Billy Xheka, Howard is totally uncorroborated and the singular witness against him. Howard's testimony was seriously impeached to say the least, fraught with inconsistencies, alterations and changes of facts and circumstances previously under oath and otherwise. In fact, certain areas of his testimony clearly approach perjury. At best the government's proof in this case is questionable and seriously suspect. For this reason, the issues herein become doubly significant and the fairnesss of the defendant's trial must be circumscribed by the character and sufficiency of this testimony, as well as the potential prejudicial effect of any suppressed material which could have affected his credibility and the weight to be afforded his testimony.

When the reliability of any given single witness may well be determinative of guilt or innocence, matters affecting substantial fairness and concerning credibility and/or perjury, including nondisclosure of impeaching materials, restriction of cross examination and comments of the Court reflecting upon credibility, take on a unique significance upon review creating almost a presumption of relevance and materiality in and of themselves without placing a burden upon the appellant to establish actual prejudice. Prejudice and relevancy become presumptive based upon the close question of credibility and evidentiary sufficiency, especially as here, when dealing with bought testimony from a co-conspirator. *Giglio* v. *U.S.*, 405 U.S. 83 (1972); *Napue* v. *Illinois*, 360 U.S. 264 (1979); *Mooney* v. *Holohan*, 294 U.S. 103 (1935); *Brady* v. *Maryland*, 373 U.S. 83 (1963).

The prosecution in this case demonstrated a clear and purposeful pattern of suppressing and keeping from the defense substantial evidence within their possession and/or knowledge which seriously impeached and affected the credibility of Wadie Howard, and substantially hindered the cross examination.

If anything is truly apparent from a fair reading of the proceedings in this case, it is the fact that the prosecutors repeatedly violated their obligations of disclosures both in conformity with pre-trial *Brady* motions and the Court's specific instructions to turn over such evidence (CL 25, 34, 40). The violations were so apparent and frequent that the Court on one occasion specifically *stated* that three incidents of concealment had already occurred and then inquired of the prosecutors if there was any additional material improperly withheld as she did not wish this to recur (Tr. 1014). Thereafter at least two more incidents of concealment arose. The Court even characterized their actions as making the government look extremely bad (Tr. 937) and inquired of the previous trial

experience of the prosecutors who related that they have over 115 jury trials (Tr. 938).

Prior to trial, the defense made appropriate pretrial discovery requesting all *Brady* type evidence (CL 25, 34, 40). These motions were supported by memorandum raising the critical importance of these disclosures based upon the singular uncorroborated importance of Howard's testimony and the extreme relevance of material reflecting upon his credibility (CL 42). *U.S.* v. *Giglio, supra* was specifically cited as a case in point (CL 42). Indeed, a full day, pretrial, was spent arguing the disclosure of such documents concerning Howard's involvement in other offenses, investigations, and testimonies before other Judges. The trial Court during such arguments clearly reflected her concern for full compliance. These motions were ruled moot by the Court based upon the government's erroneous and false representations that they had fully complied, searched their files, and turned everything over (CL 79; Tr. 12-A, 13-A, 14-A). These protestations came forth from the prosecution on each successive incident, one after the other despite each previous discovery of non-disclosure. Notwithstanding the above, five specific instances of suppression resulted during trial. A sixth instance was raised in the post trial motion.

The first incident occurred near the end of Howard's cross, when Howard suddenly for the first time blurted that on Saturday evening-Sunday morning, after receiving the key, he entered the premises and removed 12 cases of liquor from the supply room (Tr. 650, 651, 652, 657, 658). He had told the government this pretrial, and that they had recorded it (Tr. 651-652). He told this to both the prosecutors and agent Gorecki (Tr. 650, 651, 652). It is conceded that this fact was omitted from his July 1979 statement and Grand Jury testimony (Tr. 651) and was not included in the § 3500 material turned over to the defense (Tr. 670-A). The government admitted that How-

ard had told them of this ten days before the trial and that it was in their notes (Tr. 670-A). The prosecutors also conceded, that they never mentioned this to the defense (Tr. 670-A), and it was never brought out during Howard's direct testimony (Tr. 670). Although they knew of it before Meeker, Ciolli and Williams testified they allowed those witnesses to testify that the liquor supplies were sparse, infer the defendants had removed such liquor and then allowed that obviously false inference to remain with the jury (Tr. 96, 97, 98, 106, 142, 162, 164). The prosecutors indicated that they had intended to bring this out on direct, but had inadvertently neglected to do so (Tr. 670-A, 676). The record clearly refutes this claim and a reading of the question sequence demonstrates that the question was not omitted, but the questioning purposely led the witness to another day and incident immediately after he answered concerning the securing of the key (Tr. 678, 679). It was during this incident that a standing oral motion to dismiss based upon government misconduct was made and ruling thereon reserved throughout the trial as the other incidents unfolded (Tr. 676, 679). It should be pointed out that the removal of liquor by Howard had other significance than accounting for a low liquor supply at the time of the fire. This was an identical aspect of his Seville House testimony and strikingly similar thereto (Tr. 670-A). It further provided an area of impeachment of Howard regarding the locked liquor door, the type of lock thereon and the fact that the disco was open and in operation at the time he allegedly removed this liquor in the presence and view of people in attendance thereat.

The second incident again occurred during Howard's cross and after it had progressed even further. At all times earlier, Howard had testified to only one meeting at Elliott's in the presence of Shaban Islami (Tr. 461, 462, 766). His 1979 statement and Grand Jury testimony likewise indicated this. Indeed, the government prosecutors

in making an offer of proof to the Court earlier concerning the admissibility of the 1979 tape recording referred to only one meeting at Elliott's. All §3500 material indicated only one such meeting and indeed Islami himself indicated only one such meeting, which the prosecutors concede (Tr. 939). Yet on cross examination, Howard attested to a second such meeting allegedly occurring a week after the first (Tr. 927) and in front of the jury the prosecutor nodded affirmatively, corroborating Howard's testimony that he had told this to the government in advance of trial (Tr. 928-929). Upon this revelation, the objection was put of record, whereupon the Court criticized and chastised the prosecutor for the indication made in front of the jury (Tr. 930, 939). The Court at this point, still indicated a belief that the government conduct was inadvertent (Tr. 937) despite the prosecutor's depth of experience (Tr. 937) and the fact that omission of this testimony by the government to this point clearly brought Howard's testimony into greater focus with Islami's and subject to less impeachment.

The third incident involved the suppression of a pretrial, post indictment photographic lineup held about three weeks before trial wherein Jean Thompson and Barbara Jackson identified a photo of Sonny Xheka. This testimony was perhaps the second most important corroborative piece of evidence concerning Wadie Howard's testimony. Sonny's identification was of critical importance to the government and the circumstances of that identification highly important to the defense. The identification although post indictment was made in secret and kept secret by the government, knowing the defense had been misled into believing that no pre-trial identification had occurred. When Jean Thompson testified on direct, no questions were asked of her regarding the photo lineup and the area was left totally omitted. A critical piece of corroborative identification was purposefully omitted from direct by the government, aware as they were that the

defense had no idea of its existence or that the witness would identify Sonny in Court. After the identification in Court, one would expect vigorous cross examination to impeach the circumstances and suggestiveness of the identification. For what strategical purpose then would the government allow this to occur? For the obvious purpose that resulted on cross when counsel in attacking the identification, unawaredly brought out the matter from an otherwise primed-witness who neutralized any impeaching effect of the time delay with the corrobrative effect of the circumstances of the lineup. The most telling corroboration there can be is via cross examination by the defense attorney in attempting to impeach. In short, this was a purposeful step. A deliberate suppression of the lineup and a purposeful orchestration by the government avoiding recordation and reporting of the identification and lineup by Gorecki. This clearly does not equate with substantial fairness and cannot be rationalized away as appropriate trial tactic. A lineup identification with its attendant constitutional issues of suggestiveness is the basic evidence at which pretrial discovery is directed. This should have been disclosed at the §2.04 conference.

The prejudicial effect was obvious notwithstanding the constitutional issues attendant thereto regarding questions of suggestiveness and of admissibility viz a viz Wade, Gilbert and Stoval. The Court sought to cure these constitutional considerations by interrupting the trial and providing voir dire examination of the witnesses into the issue of suggestiveness. But this in no way cured the prejudice resultant from the defense's inadvertent corroboration and solidification of the witnesses' identification of Sonny. However, the Court again, incomprehensibly, found nothing purposeful nor deliberate in the government's suppression of this lineup despite Gorecki's testimony that in such cases, in all investigations except this one, since he has been in law enforcement, he has never failed to make a report concerning an identification or lineup, photo or otherwise.

It was a mistake not to have made one in this case and he should have done so (Tr. 1393-1396).

The fourth area concerned cross of Barbara Jackson-Howard. Pretrial a typewritten statement signed by her and read under oath before the Grand Jury had been turned over as §3500 material. No other documents were turned over. On cross she related that in addition to the typewritten statement, she had handwritten her own statement and signed it for agent Gorecki (Tr. 1414-70). The government acknowledged possession of this statement and their failure to turn it over, claiming it was identical to the typewritten one (Tr. 1414-70 & 71). When this was pointed out to the Court, she ordered the government to turn over the holographic statement. It then became apparent and was pointed out to the Court that the two statements differed in one very important regard (Tr. 1414-113 & 1414-114). Barbara Jackson had testified she had never been to the Bull and Bear and consequently had never seen Sonny to formulate a basis for her identification apart from these alleged meetings. In her handwritten statement, not turned over to the defense, she knew and had handwritten in her own hand the exact post office address of the Bull and Bear; 111 West Jackson (Tr. 1414-115). In the typewritten statement which was supposed to be a verbatim copy thereof, all reference to the address had been deleted. The fact that the witness, after disclaiming knowledge of the Bull and Bear other than by reference from friends and denying having ever been there, five years later could have remembered or known the precise address accurately was a serious impeaching issue that should have been turned over which the Court properly agreed with and admonished the government that a motion to dismiss on these grounds was still pending (Tr. 1414-123-1414-124).

The fifth incident occurred during the defense's case and arose incidentally when preparing Imaculatta Baki. She indicated to defense counsel that two years ago, she had

been contacted by Gorecki and shown a photograph of what appeared to be Wadie Howard (Tr. 1666, 1667, 1668). She told agent Gorecki that the man in the photo had never been in the Bull and Bear and she never saw him before (Tr. 1667). After Miss Baki had testified and objection was noted, it was called to the Court's attention that yet again the prosecutor had failed to disclose this information to the defense. That it had again been inadvertently discovered and that this testimony was clearly *Brady* type evidence impeaching and contradictory of Howard's testimony (Tr. 1685). The government, clearly indicating a failure, to properly realize the true impact and extent of their obligation under *Brady* and perhaps accounting for their repeated earlier failures to turn over proper *Brady* material, argued strenuously at this time that, although they were aware of Miss Baki's testimony and had such documents in their possession, Miss Baki's testimony was not *Brady* type evidence which they were required to turn over (Tr. 1686). The Court however and correctly so, ruled that this evidence was clearly *Brady* material and the government had engaged in misconduct in not turning it over (Tr. 1687). The Court however found no prejudice in this regard and continued on. What the Court failed to do was to conduct inquiry as to how many other witnesses and/or ex-employees of the Bull and Bear had been interviewed similarly and refuted Howard's allegations. Had this not been discovered at the 11th hour of trial, the defense could have resecured from the government the corporate records and conducted its own investigation.

However, one potential witness stuck out as obviously having been contacted, the black cook who Howard claimed was present at all three meetings and who allegedly commented about the gasoline drums. This man, Sam Ross, was discovered and interviewed, post trial, by the defense wherein it initially was discovered that he too had been interviewed, shown a photo of Howard and had repudiated Howard's story of the meeting and comments attributed

to him. The government again failed to disclose to the defense attorneys that they had taken a statement from Ross.

This sixth instance of concealment was then raised in the post trial motion requesting, in addition to other relief, a hearing into additional instances and areas of suppression regarding other witnesses who were similarly interviwed and remained undisclosed (CL 116). At sentencing, argument was heard on this motion for an evidentiary hearing and an offer of proof was made to the Court indicating what Sam Ross had revealed in his post trial interview (Tr. 13-14). The Court denied the motion as well as the request for a hearing. At the post trial motion, the government denied any knowledge of the Sam Ross interview and denied possession of any statement from him impeaching Howard. However, in the 7th Circuit in their brief, they admitted having the statement and its inconsistency with Howard's testimony and that they had misled and misinformed the Court.

The above six instances combined to effectively deny the defendants a fair trial in conformity with their constitutional right to substantial fairness and due process as well as their right to effective assistance of counsel and full and vigorous cross examination. *Brady* v. *Maryland*, 373 U.S. 83 (1963), clearly obligates the government to turn over all evidence favorable to an accused upon request when the evidence is material to guilt or punishment. It is clear in this case that in six separate areas important evidence in the possession of the government was secreted from the defense. The evidence was substantially impeaching and refuted the singularly critical testimony of the key witness, Howard. It is clear from *Giglio* v. *U.S.*, 405 U.S. 150 (1972) the *Brady* material applies to such impeaching evidence and it is clear in this case that specific requests had been made for the material pre-trial and continuously during trial. The Court had, recognizing the critical nature of Howard's testimony and his possible

motivation to lie ordered the government to turn over specific impeaching documents, and only held the other motions moot upon being assured by the government that all *Brady* documents had been turned over. This assurance was less than truthful as the record demonstrates. It is apparent that the prosecutors were cavalier to say the least regarding this *Brady* obligation and misunderstood and failed to comprehend the nature and extent of obligation. For that reason, their conduct can only be characterized as deliberate and purposeful in suppressing this material. Where Courts have found purposeful and deliberate suppression, the degree of prejudice which must be shown to entitle one of the requested relief is apparent and the evidence suppressed by definition becomes highly material. *Giglio* v. *U.S.*, *supra*. This is even greater whereas, in the case at bar, the evidence withheld created serious questions of the truthfulness of the government's key witness and suppression thereof implies an attempt by the government to prevent the defense from establishing their untruthfulness and insulate the witness's credibility in testimony that the government should have reason to believe was false or at least highly suspect. The natural extension of this argument infers a known use of false evidence which formulated the basis of this Court's decision in *Brady* and *Giglio*, *supra*.

This Court said in *Giglio* on p. 159:

> . . . deliberate deception of a Court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice . . . the same results obtain where the state, although not soliciting false evidence, allows it go uncorrected when it appears. . . . Suppression of material evidence justifies a new trial irrespective of good faith or bad faith by the prosecutors . . . when the reliability of a given witness may well be determinative of guilt or innocence . . . non-disclosure of evidence affecting credibility falls within this general rule. . . . A new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. . . .

In *Giglio*, as in the case at bar, the conviction hinged on the credibility of a co-conspirator-informant. A new trial was ordered based solely upon a singular inadvertent failure, to disclose a discussion concerning the witness's future prosecution and its effect on the witness's credibility. In the case at bar, the facts are much stronger indicating repeated and deliberate violations concerning a witness whose credibility was at least as critical as in *Giglio*.

In the case at bar, the material suppressed really fits into all three categories of material formulated by this Court in *U.S. v. Agurs*, 427 U.S. 104 (1976) and correspondingly satisfies much of the tests requiring a new trial. First as typified by *Mooney v. Holahan*, 294 U.S. 103, the undisclosed evidence demonstrated that the prosecutor's case included false and possibly perjurious testimony and that the prosecutors knew or should have known this from the very nature of the evidence suppressed. In this instance, the Courts have applied a strict standard of materiality, not just because prosecutorial misconduct was involved, but more importantly because they involved a corruption of the truth seeking function of the trial process. The case at bar dramatically typifies a purposeful and repeated corruption of that process, so much so that the defendants cannot be said to have enjoyed their right to a fair trial.

Secondly, as illustrated by the *Brady* case itself, the situation is characterized by a specific pretrial request for the evidence. In the case at bar, at least as they related to Howard's statement, specific pretrial requests were made for all this material. This Court in *Agurs* held at 106:

> "In *Brady* the request was specific. It gave the prosecutor notice of exactly what the defense desired. . . . When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."

In such cases, the standard is that if the suppressed evidence could have affected the outcome of the trial, a new trial is required. In the case at bar, the nature of the evidence suppressed coupled with the other serious evidentiary problems and errors raised in this case, quite apparently could have resulted in a contrary verdict.

The third situation involves a general request for all exculpatory material in the possession of the prosecution necessitated by the defense's lack of knowledge of its specific existence or identity. The duty to disclose in response to such a general request, derives from the obviously exculpatory character of certain evidence in the hands of the prosecutor, *U.S.* v. *Agurs, supra* at p. 107. Concededly, some of the material requested, Baki's statement and the cook's statement for example, fall within this category. However, these witnesses clearly are so obviously supporting of innocence and contradictory of Howard so as to create an obvious duty of disclosure. Furthermore, if evidence is highly probative of innocence, as here, the prosecutor is presumed to recognize its significance even if he has actually or claims to have overlooked it, *U.S.* v. *Giglio, supra; U.S.* v. *Agurs, supra.* In such instances, if the suppressed evidence could create a reasonable doubt that did not otherwise exist, constitutional error has occurred. In this case, based upon the marginal evidence presented and the contradictory, questionable testimony of Howard, it is impossible to say that this suppressed evidence, particularly the cook's testimony, added to and corroborating Miss Baki, in refuting the payment meetings at the restaurant could not have, in fact, raised a reasonable doubt of guilt. Although the Baki material was discovered during trial as were the other incidents, the cook's testimony was not discovered until after the trial and never presented to the jury.

In addition, it must also be remembered that we are dealing with more than just an inadvertent, isolated suppression of a single item. We have here a continuing pat-

tern of suppression occurring throughout the trial which led the Court to comment that she believed non-disclosure to constitute government misconduct. In such circumstances, even if the withheld evidence is not conclusively material resulting in apparent prejudice, non-disclosure of such information is reversible error when the prosecutor's failure to reveal the evidence was not in good faith but was deliberate, purposeful or in bad faith. For this reason alone the Court should have granted the motion to dismiss or at least granted a hearing.

Thus, from the character of the purposeful and repeated violations of disclosure, the fact that the defense ultimately uncovered and aired the areas of suppression at least regarding the first five areas of suppression, does not remove the prejudice or obviate the error. Prejudice must be presumed around these facts. It is difficult to fathom how the defense would have benefited or altered its presentation having properly been afforded their material pretrial.

In situations where the three arguments of a valid *Brady* complaint are demonstrated, (1) prosecution suppression of evidence; (2) which is favorable and; (3) material to the defense, unless the record as constituted shows conclusively that the relief sought is not available, an evidentiary hearing must be held pursuant to 28 U.S.C. §2255. In the case at bar, the relief sought is not patently unavailable and the Court should have held an evidentiary to determine whether in fact the cook's testimony was suppressed and whether or not it comported with the offer of proof made substantially corroborating Miss Baki and refuting and questioning the truthfulness of Howard's testimony. If these proved true, clearly the defense was entitled to a dismissal or at the very least a new trial for such testimony in the government's possession must provide yet another inference to the government that Howard's testimony was untruthful and this factor on top of all the others could have substantially effected the jury's consideration of the defendant's guilt.

For the above reasons, the appellants were not afforded a fair trial, were denied due process of law and a reversal is required or at least a remand to conduct such a hearing.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the 7th Circuit Court of Appeals.

Respectfully submitted,

SERPICO, NOVELLE, DVORAK
& NAVIGATO, LTD.

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ROBERT A. NOVELLE

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 82-1207

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SADIK XHEKA and BEHA XHEKA,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 Cr 370—**Susan Getzendanner**, *Judge*.

ARGUED NOVEMBER 3, 1982—DECIDED APRIL 6, 1983

Before PELL and CUDAHY, *Circuit Judges*, and BONSAL, *Senior District Judge.**

PELL, *Circuit Judge*. Defendants appeal convictions on charges stemming from a fire that destroyed their downtown Chicago restaurant. Sadik "Sonny" Xheka and Beha "Billy" Xheka were found guilty by a jury of conspiracy to damage or destroy a building used in interstate commerce by means of an explosive in violation of 18 U.S.C. §§ 371, 844(i). Sonny was also convicted of the substantive offense of violation of section 844(i), while co-defendant Chris Callas was acquitted on both counts. Be-

* Senior District Judge Dudley B. Bonsal of the Southern District of New York is sitting by designation.

cause of the nature of the case, and the plethora of claims advanced by defendants, we will review the facts in some detail.

I

We must view the evidence in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942). The evidence presented at trial, if believed by the jury, proved that the following events took place. On July 1, 1976, Wadie Howard, a well-known arsonist, met with Chris Callas in a bar. Howard and Callas had been acquainted for many years. Callas told Howard that he had a friend, named Sonny, who had a problem that Howard could probably solve. Callas asked Howard to pass along some money if he were rewarded for his efforts. Callas did not tell Howard what the nature of Sonny's problem was, but did give him the address of the Bull-n-Bear Restaurant, the restaurant owned by the Xheka brothers.

Two days after this conversation Howard drove to the Bull-n-Bear and asked the bar maid for Sonny. Sadik Xheka appeared and Howard introduced himself and explained that he had been sent by Callas. Before talking with Howard Sonny made a brief telephone call. After the call Sonny offered Howard a drink and showed him around the restaurant. Sonny and Howard proceeded to the lower level cooking area where they met Sonny's brother, Billy. Sonny asked Howard to name a price for destroying the premises. Billy and a cook were standing a few feet away during this conversation. Howard said that he would burn the restaurant for $5,000 and expenses. Sonny accepted the offer, stating that "I can afford that because I have a good insurance policy plus an interruption clause in my insurance policy." Howard was given $400 for expenses and agreed to return at a later date to collect the first payment of the $5,000. Billy, who understood and spoke English, said nothing throughout this discussion.

On July 10 Howard returned to the Bull-n-Bear and entered the lower level office with Sonny and Billy. Son-

ny gave him an envelope containing $2,500 in cash and said that the restaurant had to be totally destroyed by the first of the month. Once again Billy did not participate in the conversation. On July 21 Howard returned to receive the final $2,500. Billy and the cook were present when Howard counted the money. Billy said nothing during the transaction.

The following day Howard went to a junk-yard and purchased two 55-gallon drums, which fortuitously were labeled as fruit juice concentrate. On July 23 Howard filled the drums with gasoline and then drove to the Bull-n-Bear. The maintenance staff at the receiving dock would not allow Howard to deliver the drums to the restaurant, so he enlisted Sonny's aid. The two men obtained a cart and wheeled the containers into the cooking area. Billy and the cook were in the kitchen, and the cook joked that he had never seen cooking oil delivered in that fashion before. On Sonny's instructions Howard placed the drums in the wine cellar.

Howard returned to the Bull-n-Bear Saturday night, July 24, and met with Sonny. Sonny gave Howard a key to the restaurant and left. On direct examination Howard testified that he also left, but on cross-examination Howard stated that he had entered the Bull-n-Bear and removed twelve cases of liquor, apparently on the belief that it would be put to better use if he took it than if it were destroyed along with the restaurant.

On July 25, at approximately 10:30 p.m., Howard returned to burn the restaurant. He had not informed Sonny or Billy that this was the date he had chosen for the fire. A few minutes after Howard entered the restaurant the building engineer arrived. Howard let him in and explained that he was the "clean-up man." The engineer examined the air-conditioning and left. Howard spread hand-towels throughout the restaurant and poured out the gasoline. While Howard was preparing the fire, Sonny, Billy, and a white-haired man were sitting in the office playing cards. When Howard finished pouring out the gasoline Sonny suggested to his fellow

cardplayers that they leave. Sonny removed some money and insurance papers from the safe, and the three men left the building. Howard then placed one of the gas-soaked towels next to the door, lit the end of the towel and stepped out into the street. As Howard walked toward his car he heard an explosion and breaking glass.

A woman parked across the street from the Bull-n-Bear saw Howard leave the restaurant, and then heard an explosion and saw flames coming from the building. The building engineer testified that he had entered the restaurant twice that night and had seen Howard.[1] The engineer spotted the fire at 12:30 a.m. and pulled the fire alarm.

The fire investigators determined that the fire had been purposely set. Howard was immediately suspected when his description was given by the engineer and the woman who had seen him leave the fire. When interviewed Sonny denied any knowledge of Howard or of the 55-gallon drums found in the restaurant. After Howard was arrested, however, Sonny refused to sign a complaint.

Howard was arrested on July 26. He called his wife, Barbara Jackson, and told her to call Sonny and arrange a meeting. Jackson was to bring a photograph of Howard as identification and obtain money for bail and attorney's fees from Sonny. Jackson, accompanied by a friend, Jean Thompson, met with Sonny. Because of some confusion regarding the amount of money Howard needed, Jackson and Thompson met with Sonny on two more occasions.

Howard was released on bond on July 28. Shortly thereafter he met with Sonny at a restaurant owned by Shaban Islami. Howard asked for an additional $2,000

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[1] The testimony throughout the trial was contradictory on many details. We will only note those that are relevant and assume, as we must, that the jury resolved the contradictions in the Government's favor. We note, additionally, that most of the inconsistencies were minor and of no real relevance.

for attorney's fees. Islami gave Sonny a bundle of cash from which Sonny gave Howard the needed money. This scenario was repeated a week later when Howard extracted $750 from Sonny for "pocket money."

In December of 1976 the Xhekas filed suit against their insurance company to obtain over $800,000 in compensatory damages. That suit was still pending at the time of trial. Records from the Bull-n-Bear revealed that the restaurant had suffered an actual operating loss of almost $25,000 between March and June of 1976.

The final piece of evidence offered by the Government was a tape recording of a conversation that took place in 1979 between Chris Callas and Howard, who was cooperating with the Government. The gist of the conversation, which will be discussed in detail later, was that Callas thought that the Xhekas should cooperate with Howard so that they could obtain the insurance payment.

Defendants did not testify, but they did present several witnesses. Imaculotta Baki, bookkeeper at the Bull-n-Bear, testified that she had been in the restaurant when the meetings allegedly took place and that Howard had never been in the restaurant. As Callas was acquitted we need not discuss his witnesses, other than to note that one witness testified that the bar in which Howard claimed to have met with Callas had been demolished before July of 1976.

II

Defendants' first contention is that 18 U.S.C. § 844(i) is inapplicable to the facts of this case. In pertinent part section 844(i) provides punishment for "[w]hoever maliciously damages or destroys . . . by means of an explosive, any building . . . used in interstate or foreign commerce." "Explosive" is defined in section 844(j) as:

> gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes . . . detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices

> within the meaning of paragraph (5) of section 232 of this title, *and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire . . . may cause an explosion.* (emphasis added)

The Government proceeded under the theory that the gasoline spread throughout the restaurant, and the fumes it produced, constituted a chemical compound or mechanical mixture possessing the requisite characteristics under paragraph (j). In support of this theory the Government presented expert testimony, by stipulation, that "gasoline is a chemical compound, mechanical mixture or device that contains combustible units or other ingredients in such proportions, quantities or packing that ignition by fire . . . may cause an explosion." Evidence was also presented to prove that ignition of the gasoline-soaked trailers had in fact caused an explosion.

Defendants argue that, while their actions may constitute arson in violation of state law, gasoline poured throughout a building does not fall within the statutory definition of "explosive." A similar contention was rejected by this court in *United States v. Agrillo-Ladlad*, 675 F.2d 905 (7th Cir. 1982). In *Agrillo-Ladlad* defendants had destroyed a commercial printing company by spreading naptha-soaked newspaper throughout the building. The process of preparing the fire took two hours, allowing the building to fill with naptha fumes. When ignited the fumes exploded. At trial the Government presented expert testimony that naptha vapors and air form a potentially explosive mixture. After analyzing the history and language of the statute we concluded that this situation was covered by section 844(j).

> The legislative history indicates that Congress intended to define broadly the term "explosive" for purposes of the malicious use of explosives section of the Organized Crime Control Act; that Congress

realized that state and federal jurisdiction would overlap in certain instances, such as arson cases; and that simple devices using common substances could be used to create an explosive within the meaning of the Act. 675 F.2d at 911.

The Eighth, Tenth and Eleventh Circuits have reached the same conclusion when confronted with facts almost identical to those before us today. *United States v. Hepp*, 656 F.2d 350 (8th Cir. 1981) (mixture of methane, a natural gas, and air held to be mechanical mixture within the scope of section 844(j)); *United States v. Poulos*, 667 F.2d 939, 942 (10th Cir. 1982) ("any person would conclude that the pouring of gasoline around a room with the intention of igniting it or the fumes with an incendiary device was prohibited by sections 844(i) and (j)"); *United States v. Hewitt*, 663 F.2d 1381 (11th Cir. 1981) (10 gallons of gasoline poured down a chimney and ignited is a chemical compound under section 844(j)). In *United States v. Gere*, 662 F.2d 1291 (9th Cir. 1981), the Ninth Circuit rejected this broad interpretation of the term "explosive." In *Gere* the court had not been presented with any expert testimony and did not analyze the legislative history of sections 844(i) and (j). For these reasons we found *Gere* unpersuasive when we decided *Agrillo-Ladlad*, and we find it unpersuasive now. Similarly, we reject the reasoning of *United States v. Birchfield*, 486 F. Supp. 137 (N.D. Tenn. 1980).

It is clear that the gasoline poured throughout the Bull-n-Bear was an explosive within the meaning of section 844(j). Wadie Howard testified that preparing the fire took several hours, providing plenty of time for the gasoline fumes to mix with the air and form an explosive mixture. As the court noted in *United States v. Poulos*, 667 F.2d at 942, "It is common knowledge that gasoline is highly combustible and capable of exploding. The government's expert witness testified to the fact that gasoline can be an explosive, and it does fit under this statute." We hold that the gasoline and gasoline-soaked

towels, which exploded when ignited, fall within the proscription of 844(i).[2]

III

Defendants argue that they were denied a fair trial due to prosecutorial misconduct, bias on the part of the trial judge and undue limitations placed upon their cross-examination of Howard. We will examine these contentions seriatim.

A. Prosecutorial Misconduct.

The charge of misconduct by the Government stems from the alleged suppression of exculpatory evidence by the prosecution. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Defendants made a general request for *Brady* material, and now allege that the prosecution failed to fulfill its obligation under *Brady* in the following six instances:

(1) One week before trial Wadie Howard informed the prosecutors that he had taken twelve cases of liquor from the Bull-n-Bear the night before the fire. The prosecutors did not inform defendants of this, nor did they bring it out during direct examination of Howard.[3] Dur-

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[2] Our conclusion that "explosive" is to be read broadly is bolstered by the recent amendment of section 844, which is intended "to *clarify* the applicability of offenses involving explosives and fire." (emphasis added) As amended section 844(i) reads: "Whoever maliciously damages or destroys . . . by means of *fire or* an explosive, any building . . . used in interstate or foreign commerce" shall be guilty of the proscribed offense. Anti-Arson Act of 1982, Pub. L. 97-298, 96 Stat. 1319 (1982).

[3] The Government contends that this was unintentional. The record reveals, however, that Howard was led away from this

(Footnote continued on following page)

ing direct examination of the fire investigators, which took place before Howard testified, the prosecution elicited that liquor supplies in the Bull-n-Bear were low at the time of the fire, with the clear implication that defendants had removed it themselves before burning the building. It was only during cross-examination of Howard that the true explanation came out.

(2) One week before trial Howard informed the prosecutors that he had met with Sonny a second time at Islami's restaurant. This was also not brought out during direct examination, but was revealed on cross-examination of Howard. Islami testified that Howard came to his restaurant only once.

(3) Three weeks prior to trial a Government agent showed Barbara Jackson a photo array from which she identified Sonny as the man she had met. Jackson initialed the back of the photograph. The agent then went to Jean Thompson's place of employment and showed her the same photographs. Thompson picked out Sonny's picture and initialed the back. Defense counsel were provided a photostat copy of the front of the photo array, but did not avail themselves of the opportunity to view the originals or ask whether the women had made an identification. During direct examination Thompson made a positive identification of Sonny, but no mention was made of the previous photographic identification. On cross-examination Thompson was asked how she could be positive that Sonny was the right man when she had not seen him for several years. Thompson replied that she had previously identified his photograph.

Defense counsel objected to Thompson's identification because they had not been informed of the pre-trial

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[3] *continued*

subject during the direct examination. The motive of the prosecutor, regardless of how this incident is characterized, is irrelevant. "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *United States v. Agurs*, 427 U.S. 97, 110 (1976).

identification. The judge excused the jury and held a voir dire to determine whether the photo array was unduly suggestive. Jackson testified that she had called Thompson after the agent left, but before he arrived at Thompson's workplace, and told her about the identification. Thompson, however, denied receiving this phone call or knowing that Jackson had identified Sonny. The court determined that Thompson had not seen Jackson's initials before choosing Sonny's picture, but did not resolve whether Thompson had been aware that Jackson had made an identification. The court ruled that the array was not suggestive and allowed the in-court identification to stand.

(4) Prior to trial the Government provided defendants with a typewritten copy of a statement made by Barbara Jackson, but did not deliver the handwritten copy. The statements differed in that the handwritten version contained the address of the Bull-n-Bear while the typed copy did not. Jackson claimed never to have been to the restaurant. The defense was provided with the handwritten statement during trial and questioned Jackson about her knowledge of the address.

(5) Imaculotta Baki was interviewed by a Government agent two years prior to trial and gave a statement to the effect that Howard had never been in the Bull-n-Bear during the times he claimed to have met with the Xhekas. The defense was not provided with this statement, but did discover the incident when preparing Baki for trial.

(6) After trial defendants claimed to have discovered the cook Howard had referred to in his testimony, a man named Sam Ross. They made an offer of proof that Ross would testify to being interviewed by a Government agent and repudiate Howard's story.

The arguments advanced by defendants concerning the first five of these instances reveal a misunderstanding of *Brady*. We dealt with a similar misunderstanding in *United States v. McPartlin*, 595 F.2d 1321 (7th Cir. 1979), *cert. denied*, 444 U.S. 833, in which the Government during its opening statement first revealed that its

principal witness had embezzled large amounts of money from defendants. On appeal, defendants claimed that *Brady* required disclosure of this information before trial. We rejected this argument.

> We note initially that *Brady* and its successor, *United States v. Agurs*, 427 U.S. 97 (1976), address a thoroughly different problem than the one before us. The concern of *Agurs* and *Brady* is whether the suppression of exculpatory material until after trial requires that a new trial be given so that the evidence may be considered. The Court in *Agurs* characterized the situations to which *Brady* apply as those involving "the discovery *after trial*, of information which had been known to the prosecution but unknown to the defense." 427 U.S. at 103 (emphasis added).
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> * * * *
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> The defendants here, however, do not complain of a total suppression of favorable evidence but merely attack the timing of the disclosure of such evidence.
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> * * * *
>
> The appropriate standard to be applied in a case such as this is whether the disclosure came so late as to prevent the defendant from receiving a fair trial.

595 F.2d at 1346. We have consistently followed this approach when the disclosure comes during trial, *see United States v. Allain*, 671 F.2d 248, 255 (7th Cir. 1982); *United States v. Zipperstein*, 601 F.2d 281, 291 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980).

While we do not condone the Government's conduct, especially as to avoiding the theft of the liquor during direct examination of Howard, we fail to see how the defense was prejudiced. All of the information became available to defendants during trial, and defense counsel was able to make full use of whatever value it had. If anything, the revelation of various factors on cross—

rather than direct—examination made Howard look less credible than he otherwise would have appeared. This situation is similar to that presented in *United States v. Johnson*, 487 F.2d 1318, 1324 (5th Cir. 1974), *cert. denied*, 419 U.S. 825, in which the prosecution attempted, unsuccessfully, to hide that a bargain had been made with a Government witness. The court rejected defendant's *Brady* claim. "In these circumstances we cannot conclude that the prosecution's initial lack of candor deprived appellant of due process. We are not, however, favorably impressed by the prosecution's conduct."

Defendants, although making rhetorical allegations of pervasive prejudice, raise only one instance in which the presentation of their defense was harmed by the timing of the disclosures. They claim that had they been aware of Thompson's pre-trial identification of Sonny they would not have asked her how she could recognize Sonny after several years, and the damaging revelation that she had already identified Sonny's photograph would not have been made. This is not the type of prejudice to which we referred in *McPartlin*. There is no requirement that the Government disclose inculpatory information so the defense will not accidentally bring it out during cross-examination.[4] If the Government was under a duty to disclose the existence of the photographic identification it was because the defense should be allowed to explore the possible suggestiveness of the identification, which might lead to discovery that the in-court identification was tainted and should be suppressed. In this case, however, the possibility that the photographic line-up was suggestive was fully explored during voir dire and resolved against defendants. Defendants have not raised the issue of suggestiveness on appeal and we decline to review the court's findings on this.

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[4] Of course, if the damaging information is contained in a statement made by a witness prior to trial the Government may be required to turn it over to the defense *after* the witness has testified. 18 U.S.C. § 3500. In none of the instances complained of by defendants did the Government possess a statement discoverable under section 3500.

The sixth claimed *Brady* violation is more troublesome. Defendants allege that after trial they discovered that Sam Ross, the cook Howard claimed was present during many of the meetings with the Xhekas, would testify that he never saw Howard or the drums of gasoline. Ross would also testify that he provided the Government with this information several years prior to trial. The Government makes several arguments as to why no error occurred. At the outset the Government contends that mere representations by a defense attorney as to the existence of suppressed evidence are insufficient to raise a *Brady* claim and that the proper avenue of relief is a request for a new trial from the district court when defendants have obtained an affidavit proving the truth of their claim. In the context of this case this argument has no merit. The Government attached to its brief a copy of interview notes made when Ross was interrogated by a Government agent. The notes reveal that Ross informed the Government that he was employed as a cook at the Bull-n-Bear until the fire, that he worked from 6 a.m. until 3 p.m. on weekdays, and that he had never seen Howard or the drums of gasoline. This belies any claim that Ross is a figment of defendants' imagination. As the Government has not suggested that Ross was not the only cook meeting Howard's description, we will assume that he is the missing witness.

The Government next contends that this was not *Brady* material because Ross got off work at 3 p.m., while Howard testified that he met with the Xhekas at 4 p.m. This ignores Howard's claim that he spoke with the cook when he delivered the drums of gasoline at 9 a.m. on July 23, 1976, which was a weekday. Ross's statement flatly contradicts this tale. Furthermore, that Ross was not at work during the time Howard places him at the restaurant for the other meetings impeaches Howard's testimony. That Ross's testimony would have aided defendants is beyond dispute, though this does not necessarily require that the Government's failure to provide defendants with this material will result in a new trial.

The Government's main contention is that defendants have no one but themselves to blame for the nonappearance of Ross at trial. The basis of this claim is that defendants "had equal or superior knowledge of Ross' existence. He was, after all, their employee. . . . A defendant has an obligation to obtain testimony he knows about or that was fully available to him." The fallacy of this argument is that defendants, even if they can be held to know of Ross's existence some years after he left their employ, had no knowledge of what testimony he could give. In all of the cases cited by the Government the defendant was fully aware of the content of the testimony that the witness could have given. That is not true here; only the Government was aware that Ross could give exculpatory testimony. Under these circumstances defendants have not waived their *Brady* claim simply because they did not ferret out every potential witness. While the Government is under no duty to seek out witnesses such as Ross, having found him it was under an obligation to inform defendants of the exculpatory evidence he could provide.

We do not approve of the Government's action in withholding this information. We do not believe, however, that this misconduct warrants reversal. *Brady* requires that defendants be given a new trial if a "material" piece of evidence was not presented to the jury due to the Government's failure to reveal its existence to the defense. When the defense makes only a general request for *Brady* material, as was the case here, the test of materiality is whether "the omitted evidence creates a reasonable doubt that did not otherwise exist." *United States v. Agurs*, 427 U.S. 97, 112 (1976). In *Cannon v. Alabama*, 558 F.2d 1211 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978), the court noted that:

> Applying this standard requires an analysis of the evidence adduced at trial and of the probable impact of the undisclosed information. In this context we cannot merely consider the evidence in the light most favorable to the government but must instead evaluate all the evidence as it would bear on the deliberations of a factfinder. 558 F.2d at 1213-14.

The present case, although perhaps close, is unlike *Cannon*, in which the suppressed evidence clearly damaged the Government's already weak case by providing a positive identification of someone other than defendant as the perpetrator. Had Howard been otherwise unimpeached we might well have been inclined to grant a new trial, but in point of fact the jury chose to believe Howard despite a wealth of impeaching evidence. Defense counsel elicited many previous instances of untruthfulness from Howard as well as his prior criminal background. In addition, defendants presented Ms. Baki, who testified that Howard was not present in the restaurant. Ross's expected testimony simply repeated this evidence, but did not provide any other explanation as to why Howard would set fire to the Bull-n-Bear, which it is uncontested that he did. Although one can speculate as to why Howard would burn the Xhekas' restaurant without their permission the jury chose to believe the most obvious explanation for Howard's actions, that defendants hired him to destroy the restaurant. We are not convinced that the addition of Ross's testimony to the existing abundance of impeaching evidence creates a reasonable doubt.

B. Judicial Bias

We need spend little time discussing the claim that the actions of the trial court deprived defendants of a fair trial. Of the numerous allegations made regarding conduct by the trial court that defendants allege improperly influenced the jury none have merit. Defendants complain that the court's questioning of Jean Thompson demonstrates "a clear and unambiguous indication of the court's attitude and bias." Because this questioning took place outside the presence of the jury, the claim is meritless. Defendants also claim that the court, over objection, permitted Howard to remain in the courtroom while the relevance of impeaching evidence was discussed, thus allowing Howard to formulate explanations for previous inconsistent statements. We have examined the record in this case with care and can only conclude that this case is based either upon a

misrepresentation or misunderstanding of what actually took place. On none of the transcript pages cited by defendants, or anywhere else for that matter, did the judge refuse to exclude Howard while impeaching evidence was discussed. Several of defendants' remaining arguments, which we will not discuss, are based on similar misconstructions of the proceedings during trial.

Defendants also make a catchall complaint concerning the court's "impatience with and disdain for the defense and defense counsel." To the extent that this occurred it was invited by counsel, who insisted upon mentioning the maximum penalty faced by the Xhekas despite the court's admonishment not to do so. Similarly, defense counsel sought to impeach Howard by demonstrating that Howard had pleaded "not guilty" to a criminal charge of which he was in fact guilty. This was clearly improper questioning and understandably drew criticism from the court. We also note that, regardless of the cause of any impatience or disdain, no harm was done. "The trial was long and the incidents relied on by petitioners few. We must guard against the magnification on appeal of instances which were of little importance in their setting." *Glasser v. United States*, 315 U.S. 60, 83 (1942).

C. Limitations on cross-examination of Howard

Defendants argue that "the court continuously and consistently, during the course of this trial, impeded effective permissible cross-examination, refused to exercise properly judicial discretion and hampered defense counsel in their attempts to put the weight of Wadie Howard's testimony and his credibility to the test." In support of this claim defendants have offered little more than citations to pages of the transcript. Thus, unenlightened by the briefs as to the exact nature of the impermissible restrictions placed upon the cross-examination, we must rely upon our own examination of the record to evaluate this argument.

It is undisputed that a trial court has discretion to control the conduct of cross-examination. *Smith v. Illi-*

nois, 390 U.S. 129, 132 (1968); *Alford v. United States*, 282 U.S. 687, 694 (1931). We recently noted that "a trial court has wide discretion to limit cross-examination, with the standard on review for the adequacy of cross-examination on bias or motive being whether the jury had sufficient information to make a discriminating appraisal of the witness's bias or motive." *United States v. Hinton*, 683 F.2d 195, 200 (7th Cir. 1982).

It is clear from our examination of the record that the trial court did not abuse its discretion in limiting the scope of cross-examination. Few restrictions were placed upon defense counsel, and those that were—such as the prohibition on mentioning the maximum penalty faced by Howard, and the Xhekas—were proper. Defense counsel elicited a great deal of impeaching evidence from Howard, including past crimes and lies. The jury "had sufficient information to make a discriminating appraisal of the witness's bias or motive."

Despite the wide latitude granted to defendants in their examination of Howard they urged the trial court to allow the introduction of extrinsic evidence of Howard's past bad acts. As the evidence was only probative of Howard's credibility the court properly excluded it under Rule 608(b) of the Federal Rules of Evidence, which provides that: "Specific instances of conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence." The court's decision was correct.

IV

Defendants challenge the admissibility of the tape made of the conversation between Howard and Callas. The conversation took place during July of 1979 at a bar in Chicago. By this time Howard was cooperating with the Government in the investigation of the fire. The crux of the conversation was as follows:

Howard: Have you got a minute where we can talk right quick? The Government come back. I been trying to get in touch with Sonny. Have you heard anything from him?

Callas: I heard he had a restaurant somewhere, I hear. Like I say, if you really want to know, I can find out, I can find out for you.

* * * *

Howard: Give me a Schlitz. You know the worst thing that you ever did in life to me is introduce me to this guy. This son-of-a-bitch.

Callas: What now? What are they doing to you now? They welch? The cocksuckers!! They should cooperate with you if they want to get their money. They should cooperate with you. Then leave me your number and I'm going to try to, for sure, I'm going to try hard. I got this girl that's coming back in a few weeks. She knows them.

* * * *

Howard: Yes. I want to talk to 'em.

Callas: Do they get that money?

Howard: Yes, ah no. I don't, I don't think so yet. It's still pending.

Callas: Can they get the money without you?

Howard: I don't think so.

Callas: All right. I think, I think I'm gonna talk to the girl for sure.

The court admitted this conversation against all of the defendants as substantive evidence under the so-called "coconspirator exception" to the rule against hearsay testimony. Fed. R. Evid. 801(d)(2)(E). Under Rule 801 (d)(2)(E) a statement is not hearsay if "the statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." A statement is admissible under this rule only when the Government has established by a preponderance of the evidence, independent of the statement itself, that (1) a conspiracy existed, (2) that defendants and the declarant were members of the conspiracy, and (3) that the statement was made in the course of the conspiracy. *United States v. Santiago*, 582

F.2d 1128 (7th Cir. 1978); *see also United States v. Kendall*, 665 F.2d 126, 131 (7th Cir. 1981), *cert. denied*, 102 S.Ct. 1719; *United States v. Gil*, 604 F.2d 546 (7th Cir. 1979). The Government must also demonstrate that "some reasonable basis exists for concluding that the statement furthered the conspiracy." *United States v. Mackey*, 571 F.2d 376, 383 (7th Cir. 1978); *United States v. Kendall*, 665 F.2d at 133.

Defendants urge that the court erred in admitting the tape in that (1) the conspiracy ended as soon as the fire was set, and (2) Callas was not a member of any conspiracy at the time of the conversation. Defendants do not question that the Government introduced proof establishing by a preponderance of the evidence the existence of a conspiracy *to burn* the Bull-n-Bear. Their contention is that once this goal was accomplished the conspiracy came to an end and any statements later made by the conspirators are inadmissible under 801(d)(2)(E). This argument rests upon a misconception of the Government's case.

The crucial concern "is the scope of the conspiratorial agreement, for it is that which determines . . . the duration of the conspiracy." *Grunewald v. United States*, 353 U.S. 391, 397 (1957); *see also United States v. Walker*, 653 F.2d 1343 (9th Cir. 1981), *cert. denied*, 102 S.Ct. 1253 (1982); *United States v. Hickey*, 360 F.2d 127, 141 (7th Cir. 1966), *cert. denied*, 385 U.S. 928. Defendants correctly observe that an agreement to conceal a completed crime does not extend the life of a conspiracy. *Grunewald v. United States*, 353 U.S. at 405; *Krulewitch v. United States*, 336 U.S. 440 (1949). From this defendants argue that an agreement to conceal the true cause of the fire does not breathe life into this otherwise dead conspiracy. Had defendants conspired to destroy the Bull-n-Bear simply for the joy of destruction this argument would have merit, but that was not the case. The Government alleged in the indictment that "It was also an object of the conspiracy that [the conspirators] conceal . . . the true circumstances surrounding the burning of . . . the Bull-n-Bear Restaurant, Inc., *in order to facilitate future claims made to the insurer of the Bull-n-*

Bear." (emphasis added). At trial the prosecution established the poor financial condition of the business, Sonny's claim that he could afford to hire Howard because the restaurant was insured, and that the Xhekas were still seeking payment from the insurance company. All of these factors support the theory that recovery of the insurance proceeds was the primary goal of the conspiracy. Indeed, one would be hard pressed to think of any other reason the Xhekas would have for destroying their business.

The goal of obtaining money from the insurance company, which requires that the true nature of the fire remain concealed, distinguishes this case from those relied upon by defendants. In *Grunewald* the Supreme Court made clear that while an agreement to conceal the crime once the goal has been attained does not lengthen a conspiracy, "a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been obtained." 391 U.S. at 405. By way of illustration the Court distinguished the situation in which kidnappers conceal their crime (and their victim) while waiting for payment of the ransom from that in which the ransom has been paid and the kidnappers continue to conceal their involvement to avoid punishment. In the former, but not the latter, the acts of concealment further the object of the conspiracy—obtaining money—and result in lengthening its duration. The situation here is directly analogous to kidnappers waiting for the fruit of their crime to materialize. The conspiracy continues until defendants obtain the insurance money or abandon their quest. *See also United States v. Walker*, 653 F.2d 1343, 1349 (9th Cir. 1981), *cert. denied*, 102 S.Ct. 1253 (1982); *United States v. Knuckles*, 581 F.2d 305 (2nd Cir. 1978), *cert. denied*, 439 U.S. 986.

We also reject defendants' contention that there was insufficient evidence to tie Callas to the conspiracy at the time of the conversation. The Government's evidence demonstrated that Callas directed Howard to the Xhekas and expected some money in return. When Howard

introduced himself to Sonny, Sonny went and made a brief telephone call. It is a fair inference that the call was to Callas to verify Howard's credentials. Once a member of the conspiracy Callas remained a conspirator until he took affirmative steps to withdraw from the agreement. Even if Callas did nothing to further the purpose of the conspiracy after he sent Howard to see defendants, and even if Callas had, understandably, given up any hope of receiving money from Howard, he remained a conspirator. "Mere cessation of activity in furtherance of the conspiracy does not constitute withdrawal." *United States v. Phillips*, 664 F.2d 971, 1018 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 2965 (1982); *United States v. Diaz*, 662 F.2d 713 (11th Cir. 1981); *United States v. Bastone*, 526 F.2d 971, 988 (7th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976). That Callas was acquitted of involvement in the conspiracy does not retroactively undermine the court's determination that his statements were admissible under 801(d)(2)(E).[5] The standard for determining guilt, proof beyond a reasonable doubt, is not the standard for determining admissibility under the coconspirator exception. *United States v. Gil*, 604 F.2d 546 (7th Cir. 1979).

Unlike the determination of whether a conspiracy existed between the Xhekas and Callas, and whether Callas's statement was made in the course of the conspiracy, the issue of whether Callas's statement was in furtherance of the conspiracy must of necessity take into account the contents of the statement.[6] It is clear to us that the purpose of Callas's statements was to keep Howard in the conspiracy, and thereby facilitate the Xhekas' attempt to obtain the insurance proceeds. Although the

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[5] The acquittal of Callas despite the introduction of the tape, which was more probative of Callas's guilt than of the Xhekas', indicates that defendants suffered little harm from this evidence even if improperly admitted.

[6] As Howard was acting on behalf of the Government there is no question that his statements cannot be admitted under Rule 801(d)(2)(E).

conversation revealed that Callas was not in communication with the Xhekas in 1979, and did not even know if the insurance claim had been paid, it also demonstrated that he was aware of the need for Howard's cooperation and sought to that end to put Howard in touch with the Xhekas. This suffices to make the conversation in furtherance of the conspiracy. The tape was properly admitted.[7]

V

During the trial the Government called Shaban Islami as a witness. The court allowed the Government to impeach Islami through the introduction, as substantive evidence, of his previous grand jury testimony. Islami was further impeached by the testimony of a Government agent who related a previous inconsistent statement by Islami. Defendants now challenge the admission of this evidence. This claim is without merit. The trial court found that there were important discrepancies between Islami's trial testimony and his previous statements, and we agree. The Federal Rules of Evidence allow a party to impeach its own witness, and permit that it be done through the introduction of extrinsic evidence. Fed. R. Evid. 607, 613; *United States v. Inendino*, 604 F.2d 458 (7th Cir. 1979), *cert. denied*,

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[7] Defendants also contend that the tape was of such poor quality that its relevance was outweighed by the possible prejudice. The record reveals that the tape, although originally of poor quality, was enhanced to the point that it was intelligible when played to the jury.

As a final argument defendants claim that admission of the tape violated their Sixth Amendment right to confront witnesses against them. We have rejected the claim that admission of an out-of-court statement under Rule 801(d)(2)(E) violates the confrontation clause previously and we decline to reconsider this view. *United States v. Regilio*, 669 F.2d 1169, 1176 (7th Cir. 1981), *cert. denied*, 102 S.Ct. 2959 (1982); *United States v. Papia*, 560 F.2d 827, 836 n. 3 (7th Cir. 1977); *cf. Dutton v. Evans*, 400 U.S. 74 (1970).

444 U.S. 932. Islami's grand jury testimony was properly admitted as substantive evidence. Fed. R. Evid. 801(d)(1)(A); *see also United States v. Brighton Building & Maintenance Co.*, 598 F.2d 1101, 1108 (7th Cir. 1979), *cert. denied*, 444 U.S. 840.

VI

Defendants tendered several jury instructions that were rejected by the court. They now allege that the court's failure to give defendants' instructions regarding the credibility of Howard's testimony and the proof needed to convict Beha Xheka of conspiracy was reversible error. We do not agree. The instructions are to be viewed as a whole, and the exact wording of an instruction is left to the discretion of the trial court. *United States v. Kirby*, 587 F.2d 876, 883 (7th Cir. 1978); *United States v. Garcia*, 562 F.2d 411, 416 (7th Cir. 1977). The court need not give a proposed instruction if the essential points are covered by those that are given.

Defendants complain that the court's instruction on the weight to be given to Howard's testimony was inadequate. The court instructed the jury that Howard was an accomplice, had received benefits from the Government for his role in the investigation and had plead guilty to a criminal charge related to the fire. The instruction concluded: "You may give his testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care." While defendants' proposed instructions may have placed more stress upon the caution with which Howard's testimony was to be viewed, the court's instruction was more than adequate. *See United States v. Kirby*, 587 F.2d at 884. The court also rejected defendants' proposed perjurer instruction. As there was no proof that Howard was a perjurer in the legal sense of that term, the court properly rejected this instruction.

Defendant Beha Xheka tendered an instruction that read: "Mere association with conspirators is not sufficient evidence of guilt of conspiracy." The court rejected this, but did instruct the jury as follows:

In order to establish the offense of conspiracy, the government must prove these elements beyond a reasonable doubt.

* * * *

3. That the defendant knowingly and intentionally became a member of the conspiracy.

* * * *

In determining whether the defendant became a member of the conspiracy you may consider only the acts and statements of that particular defendant.

* * * *

The government must prove beyond a reasonable doubt, from the defendant's own acts and statements, that he was aware of the common purpose and was a willing participant.

These instructions were sufficient to apprise the jurors that they must judge each defendant separately and base their decision solely upon his own acts or statements, and that the evidence must prove that the defendant was a participant and not just an observer.

VII

Both defendants vigorously argue that there was insufficient evidence to support their convictions. In support of this argument defendants focus upon the credibility, or lack thereof, of Howard. It is the role of the jury, and not of this court, to pass upon the credibility of a witness. Howard was not incredible as a matter of law, and "judgment of acquittal . . . is not required because the government's case includes testimony by 'an array of scoundrels, liars and brigands.'" *United States v. Hewitt*, 663 F.2d 1381, 1385 (11th Cir. 1981) (quoting *United States v. Tiche*, 424 F. Supp. 996, 1000-01 (W.D. Pa. 1977), *aff'd mem.*, 564 F.2d 90 (3rd Cir.)). In assessing defendants' claim, then, we must accept the evi-

dence in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. at 80.

The claim that the evidence was insufficient to support the conviction of Sadik Xheka is frivolous. There was ample proof of his involvement in the crime, much of which was provided by sources other than Howard. We see no reason for extending this opinion with a review of the Government's case against Sadik.

The case against Beha Xheka is of a different nature. First, Beha argues that his acquittal of the substantive count requires that we view his conspiracy conviction with suspicion. Second, he argues that the jury improperly convicted him of doing nothing to prevent the fire rather than of being a member of the conspiracy. Beha relies upon *United States v. Caro*, 569 F.2d 411, 418 (5th Cir. 1978), for his contention that acquittal of the substantive crime with conviction of conspiracy "should engage our judicial skepticism. [And that a] critical analysis of the facts is required when such a contrariety of results does appear." He fails to quote the preceding sentence, in which the court states, "There is nothing necessarily inconsistent, in law or logic, with such a result and we do not hold that a conviction for conspiracy and acquittal of the substantive offense may never properly arise from the same facts and trial." Thus armed with some "judicial skepticism," but fully aware that the jury was not foreclosed from returning this verdict, we examine Beha's second claim.

Before reviewing the evidence against Beha we will set forth the basic principles that guide our decision. Participation in a criminal conspiracy may be shown through circumstantial evidence. *Glasser v. United States*, 315 U.S. at 80; *United States v. Hawes*, 529 F.2d 472, 482 (5th Cir. 1976). Circumstantial evidence may include whether the defendant has a stake in the outcome of the conspiracy. *Id.*; *cf. Bailey v. United States*, 416 F.2d 1110, 1115 n. 34 (D.C. Cir. 1969). Once a conspiracy is shown to exist evidence that establishes a particular defendant's participation beyond a reasonable doubt, although the connection between defendant and

conspiracy is slight, is sufficient to convict. *United States v. Melcher-Lopez*, 627 F.2d 886 (9th Cir. 1980). Most important to this case is the well-established rule that mere association, knowledge or approval of a conspiracy is not sufficient to prove a defendant's guilt. *Id.*; *United States v. Dalzotto*, 603 F.2d 642, 645 (7th Cir. 1979), *cert. denied*, 444 U.S. 994; *United States v. Baker*, 499 F.2d 845 (7th Cir. 1974), *cert. denied*, 419 U.S. 1071; *Bailey v. United States*, 416 F.2d 1110 (D.C. Cir. 1969). However, while "mere presence at the scene of the crime or mere association with conspirators will not themselves support a conspiracy conviction . . . presence or a single act will suffice if the circumstances permit the inference that the presence or act was intended to advance the ends of the conspiracy." *United States v. Mancillas*, 580 F.2d 1301, 1308 (7th Cir. 1978), *cert. denied*, 439 U.S. 958; *see also United States v. Dalzotto*, 603 F.2d at 645.

The case against Beha consisted of testimony that Beha had listened and observed the negotiations between Sonny and Howard, had joined the two men during a meeting in the office, had witnessed the delivery of the gasoline and had been present when Howard prepared the fire. Beha also stood to gain from the suit filed to collect the insurance proceeds, but he did not inform the insurance company of the true cause of the fire.

Beha argues that proof that he was aware of the conspiracy, and may even have approved of what was happening, does not amount to proof that he was a conspirator. While in many situations mere presence, knowledge, and approval would be insufficient we are not persuaded that that is true here. Beha was not an uninterested bystander, silently cheering the conspirators on. He was part owner of the business that was to be destroyed and the money that was paid to Howard was partly his. This is a far cry from the typical "mere presence" case in which the alleged conspirator has no demonstrated stake in the conspiracy and contributes

nothing to its success. *See, e.g. United States v. Caro*, 569 F.2d 411 (5th Cir. 1978) (evidence that defendant owned automobile used during drug sale, that a man matching defendant's description spoke with conspirators, and that defendant fled when confronted by Government agents insufficient to support conviction); *United States v. Baker*, 499 F.2d 845 (7th Cir. 1974) (proof that defendant lived with conspirator and provided transportation to hotel in which drug sale took place held insufficient); *Bailey v. United States*, 416 F.2d 1110 (D.C. Cir. 1969) (proof that defendant was seen speaking with robber before crime and fled after crime insufficient to establish crime of aiding and abetting). In this situation it may well be enough that defendant intentionally joined Sonny and Howard in the office for one of the meetings, although he was careful to say nothing in Howard's presence. We need not, however, rest our decision upon this point.

As we have discussed elsewhere, the goal of this conspiracy was not the destruction of the Bull-n-Bear, but rather was collection of the insurance proceeds. To accomplish this goal the conspirators needed to conceal their crime. Beha, who was fully aware of the true cause of the fire, did not complain to Sonny when he learned of the plan and did not alert the relevant authorities to prevent the fire. More importantly, Beha joined in the suit against the insurance company, doing nothing to reveal the cause of the fire. As the Second Circuit observed in a similar case, "Where the goal of the conspiracy can be reached only through deception and concealment, silence which is designed to conceal may indicate an intention to conspire." *United States v. Eucker*, 532 F.2d 249, 254 (2nd Cir. 1976), *cert. denied*, 429 U.S. 1044 (member of brokerage firm who failed to disclose fraud to SEC guilty of conspiracy). Beha was not an innocent by-stander in this situation and could properly be found guilty of conspiracy.

Conclusion

The trial of the case, and resolution of the issues raised on appeal, required a great deal of time and effort. As is often true in complex conspiracy cases the trial was not perfect, but it was fair. That is all to which the defendants are entitled. Accordingly, the judgments of convictions of the defendants are AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

(j) For the purposes of subsections (d), (e), (f), (g), (h), and (i) of this section, the term "explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

Added Pub.L. 91-452, Title XI, § 1102(a), Oct. 15, 1970, 84 Stat. 956.

Historical and Revision Notes

Reviser's Note. Based on Title 18, U.S.C., 1940 ed., §§ 464, 465 (Mar. 4, 1909, c. 321, §§ 285, 286, 35 Stat. 1144 [Derived from R.S. §§ 5385-5387; Jan. 15, 1897, c. 29, § 2, 29 Stat. 487]).

Sections were consolidated and rewritten both as to form and substance and that part of each section relating to destruction of property by means other than burning constitutes section 1363 of this title.

The words "within the maritime and territorial jurisdiction of the United States" were added to preserve existing limitations of territorial applicability. (See section 7 of this title and note thereunder.)

The phrase "any building, structure, or vessel, any machinery or building materials and supplies, military or naval stores, munitions of war or any structural aids or appliances for navigation or shipping" was substituted for "any dwelling house, or any store, barn, stable, or other building, parcel of a dwelling house", in section 464 of Title 18, U.S.C., 1940 ed., and "any arsenal, armory, magazine, rope walk, ship house, warehouse, blockhouse, or barrack, or any storehouse, barn or stable, not parcel of a dwelling house, or any other building not mentioned in the section last preceding, or any vessel, built, building, or undergoing repair, or any lighthouse, or beacon, or any machinery, timber, cables rigging, or other materials or appliances for building, repairing or fitting out vessels, or any pile of wood, boards, or other lumber, or any military, naval or victualing stores, arms, or other munitions of war", in section 465 of Title 18, U.S.C., 1940 ed. The substituted phrase is a concise and comprehensive description of the things enumerated in both sections.

The punishment provisions are new and are graduated with some regard to the gravity of the offense. It was felt that a possible punishment of 20 years for burning a wood pile or injuring or destroying an outbuilding was disproportionate and not in harmony with recent legislation. 80th Congress House Report No. 304.

§ 1153. Offenses committed within Indian country

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

As used in this section, the offense of rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offense of rape upon any female Indian within the Indian country, shall be imprisoned at the discretion of the court.

As used in this section, the offense of burglary shall be defined and punished in accordance with the laws of the State in which such offense was committed. June 25, 1948, c. 645, 62 Stat. 758; May 24, 1949, c. 139, § 26, 63 Stat. 94.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Added Pub.L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498, and amended Pub.L. 89-68, July 7, 1965, 79 Stat. 212.

§ 232. Definitions

(5) The term "explosive or incendiary device" means (A) dynamite and all other forms of high explosives, (B) any explosive bomb, grenade, missile, or similar device, and (C) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone.

CHAPTER 153. HABEAS CORPUS

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105.

CONSTITUTION

AMENDMENT V

CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule 801. Definitions.

(d) Statements which are not hearsay. — A statement is not hearsay if—

(2) Admission by party-opponent. — The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Rule 104. Preliminary Questions.

(a) Questions of admissibility generally. — Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

No. 83-338

In the Supreme Court of the United States

OCTOBER TERM, 1983

SADIK XHEKA AND BEHA XHEKA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a mixture of gasoline vapors and air that resulted from gasoline-soaked towels having been spread around a closed building constitutes an "explosive" within the meaning of 18 U.S.C. 844(j).

2. Whether the courts below correctly concluded that the charged conspiracy included not only the burning of the restaurant but also the collection of insurance proceeds, so that statements made by an alleged co-conspirator after the building had been burned but while the conspirators were still attempting to collect the insurance proceeds were admissible.

3. Whether the court of appeals correctly held that information allegedly withheld by the government would not have created a reasonable doubt concerning petitioners' guilt and therefore that a new trial was not warranted.

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In the Supreme Court of the United States

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No. 83-338

SADIK XHEKA AND BEHA XHEKA, PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 704 F.2d 974.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1983, and a petition for rehearing was denied on June 7, 1983. The petition for a writ of certiorari was filed as of August 6, 1983.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiring to damage or destroy a building used in interstate commerce by means of an explosive, in violation of 18 U.S.C. 371 and 844(i). Petitioner Sadik Xheka also

was convicted of the underlying substantive offense.[1] Sadik Xheka was sentenced to five years' imprisonment and a fine of $20,000, and Beha Xheka was sentenced to two years' imprisonment and a fine of $10,000. The court of appeals affirmed (Pet. App. 1-28).

1. The evidence adduced at trial, which is summarized in the court of appeals' opinion (Pet. App. 2-5), showed that petitioners conspired with Wadie Howard to destroy the Bull-n-Bear Restaurant, a restaurant owned by petitioners, in order to collect proceeds from an insurance policy they held on the restaurant. On July 25, 1976, at petitioners' direction, Howard ignited gasoline in the restaurant, causing an explosion and extensive damage to the restaurant.

Howard, an experienced arsonist, was referred to petitioners by co-defendant Chris Callas. Callas told Howard that Callas's friend Sonny (petitioner Sadik Xheka) had a problem that Howard might be able to solve. On July 3, 1976, Howard went to petitioners' restaurant, introduced himself to Sonny, and explained that he had been sent by Callas. Before beginning discussions with Howard, Sonny made a brief telephone call, presumably to verify Howard's credentials (Pet. App. 21). After completing his call, Sonny showed Howard around the restaurant. In the lower cooking level Sonny and Howard met Sonny's brother, petitioner Beha ("Billy") Xheka. Sonny then asked Howard what his price for destroying the restaurant would be. Howard replied that he would charge $5,000 plus expenses. Sonny agreed to that fee, explaining that he could afford it because he had a good insurance policy that included business interruption coverage. Sonny told Howard that he wanted the restaurant burned so that he could obtain these

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[1] Petitioner Beha Xheka was acquitted on the substantive count. Co-defendant Chris Callas was acquitted on both counts.

insurance proceeds, and he assured Howard that he would take care of any problems — financial or otherwise — that Howard might incur from the fire. Sonny then gave Howard $400 to cover his expenses. Billy, who was standing approximately three feet away during this conversation, said nothing. Pet. App. 2; Tr. 427, 465-466, 990.[2]

Howard returned to the restaurant twice to receive payments on his fee. On both occasions, Sonny reminded him that the job had to be completed before the beginning of August. Billy was present during both of these conversations but said nothing. Pet. App. 2-3; Tr. 427-434, 621-625.

On July 23, 1976, Howard delivered two 55-gallon drums to the restaurant. Although the drums' labels stated that they contained fruit juice, Howard had filled them with gasoline. Sonny helped Howard move the drums into the restaurant, and he instructed Howard to store them in the wine cellar. Pet. App. 3.

On Saturday evening, July 24, Sonny gave Howard a key to the restaurant. Howard returned to the restaurant the following night to burn it. He spread hand towels throughout the restaurant and poured gasoline on them. While Howard was preparing the fire, Sonny, Billy and a third man were in the office playing cards. When Howard had finished pouring out the gasoline, Sonny suggested to the others that they leave; Sonny removed some money and insurance papers from the safe and the three men left. Howard then placed one of the gasoline-soaked towels next to the door, lit the end of the towel, and stepped into the street. An explosion and fire ensued. Pet. App. 3-4.

2. Arson investigators determined that the fire had been deliberately set. Suspicion focused on Howard because a

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[2]References to the trial transcript and exhibits are taken from the government's brief in the court of appeals.

building engineer had seen him in the restaurant shortly before the fire, and because a woman parked across the street from the building had seen Howard leave the restaurant immediately before the explosion. Sonny denied any knowledge of Howard or the 55-gallon drums that were found in the restaurant, but when Howard was arrested on July 26, Sonny refused to sign a complaint against him.

Following his arrest, Howard instructed his wife to contact Sonny and obtain bail money from him. Sonny met with Howard's wife on three occasions and gave her the money to secure Howard's release. Following his release on bond, Howard also met with Sonny and asked him for an additional $2,000 for attorney's fees. Sonny gave Howard the $2,000 and an additional $750 one week later. Pet. App. 4-5.

In December 1976, petitioners filed suit against their insurance carrier for more than $800,000 in compensatory damages and $3 million in punitive damages. That suit was still pending at the time of the trial below. Pet. App. 5; Gov't Exh. 14-15.

Howard had no further contact with petitioners, but in July 1979 he met again with co-defendant Callas. By that time, Howard was cooperating with the government, and he wore a transmitter during the conversation. When Howard complained to Callas that the worst thing Callas ever did to Howard was to introduce him to petitioners, Callas asked whether petitioners had received their insurance proceeds. Howard replied that he thought that they had not, and Callas said that petitioners should cooperate with Howard and that he would contact petitioners. Pet. App. 5, 17-18.

ARGUMENT

1. Petitioners contend (Pet. 29-40) that the acts that they were found to have committed constitute nothing more than common law arson and are not within the scope of

18 U.S.C. 844(i) and (j). Petitioners further contend that the Seventh Circuit's conclusion to the contrary conflicts with decisions of another court of appeals. While we concede that there has been some difference of opinion among the circuits concerning the reach of 18 U.S.C. 844, in view of the passage of the Anti-Arson Act of 1982, Pub. L. No. 97-298, 96 Stat. 1319, and the fact that much of the alleged inter-circuit conflict already has dissipated of its own force, this Court's intervention is not necessary.

In the Anti-Arson Act of 1982, Congress amended Section 844(i) to make clear that anyone who damages or destroys a building used in commerce "by means of fire or" an explosive is subject to federal prosecution (§ 2(a), 96 Stat. 1319).[3] Since the new legislation applies to all conduct occurring on or after October 12, 1982 (96 Stat. 1319), the question presented by the petition will not be a recurring one. Review by this Court therefore is not warranted.

Even apart from the 1982 legislation, however, the divergence of views among the circuits was dissipating of its own force. The definition of "explosive" for purposes of 18 U.S.C. 844(i) may be broken down into three parts:

> I: gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders;

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[3]Passage of the Anti-Arson Act is no evidence that the prior law did not cover petitioners' conduct. To the contrary, when Congress enacted the 1982 legislation it expressly stated that its intent was "to *clarify* the applicability of offenses involving explosives and fire." H.R. Rep. 97-678, 97th Cong., 2d Sess. 1 (1982) (emphasis added).

II: other explosive or incendiary devices within the meaning of [18 U.S.C. 232(5): (A) dynamite and all other forms of high explosives, (B) any explosive bomb, grenade, missile, or similar device, and (C) any incendiary bomb or grenade, fire bomb, or similar device including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone]; and

III: any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

18 U.S.C. 844(j). The great majority of the courts of appeals that have considered the question presented here have correctly concluded, as did the court below (Pet. App. 6-8), that a mixture of gasoline vapors and air comes within the chemical compound or mechanical mixture portion (Part III) of the definition of "explosive" contained in 18 U.S.C. 844(j). See *United States* v. *Morrow*, Nos. 82-3477 & 82-3478 (3d Cir. Sept. 16, 1983), slip op. 7-9; *United States* v. *Lorence*, 706 F.2d 512, 516-517 (5th Cir. 1983); *United States* v. *Bunney*, 705 F.2d 378, 380-381 (10th Cir. 1983); *United States* v. *Agrillo-Ladlad*, 675 F.2d 905 (7th Cir. 1982), cert. denied, No. 81-2160 (Oct. 4, 1982); *United States* v. *Poulos*, 667 F.2d 939, 941-942 (10th Cir. 1982); *United States* v. *Hepp*, 656 F.2d 350 (8th Cir. 1981).

The single appellate decision on which petitioners rely (Pet. 29), *United States* v. *Gere*, 662 F.2d 1291 (9th Cir. 1981), is not to the contrary. The Ninth Circuit in *Gere* never considered the applicability of the chemical compound or mechanical mixture portion of the definition, on which the court below relied (Pet. App. 6-8), but held only that cardboard boxes soaked with photocopier fluid and connected to each other and to the point of ignition by "trailers" (photocopier fluid and fluid-soaked materials) did not constitute an "explosive or incendiary device" within the meaning of 18 U.S.C. 232(5), as incorporated into 18 U.S.C. 844(j). See 662 F.2d at 1295-1296. Moreover, in a subsequent case the Ninth Circuit expressly stated that if it were not bound by its prior decisions it would adopt the government's position that "an air-fuel mixture created by spreading gasoline inside a building satisfies the intended meaning of 'explosive.' " *United States* v. *DeLuca*, 692 F.2d 1277, 1280 (1982).[4] In view of the Ninth Circuit's own misgivings concerning its prior decisions, *United States* v. *Gelb*, 700 F.2d 875 (1983), in which the Second Circuit relied (*id.* at 878) on *Gere* to hold that uncontained gasoline

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[4]In *United States* v. *Cutler*, 676 F.2d 1245 (1982), decided during the interim between *Gere* and *DeLuca*, the Ninth Circuit had relieved a defendant of a stipulation, entered into in reliance on pre-*Gere* law, that gasoline spread throughout a warehouse and out the door to the point of ignition was an explosive within the meaning of 18 U.S.C. 844(j). Although the *Cutler* court had merely concluded (676 F.2d at 1248) that "without the stipulation, there is insufficient evidence to establish that an explosive was used as required under § 844(i)," *not* that a mixture of gasoline and air could never constitute an explosive within the meaning of Section 844(j), the *DeLuca* court nevertheless deemed itself bound by *Cutler* to reject the government's argument based on the third portion of the definition. The Ninth Circuit's reluctance to parse carefully the definitional provisions of the statute may be attributable in part to its awareness that, in view of the Anti-Arson Act of 1982, it would "not face this problem again." *United States* v. *DeLuca*, 692 F.2d at 1280.

is neither an "explosive" nor an "incendiary device" within the meaning of 18 U.S.C. 844(j), also is of questionable validity.[5]

2. Petitioners next argue (Pet. 40-51) that the district court erred in admitting into evidence, pursuant to Fed. R. Evid. 801(d)(2)(E),[6] the tape of the July 1979 conversation between Howard and Callas because, petitioners claim (Pet. 44-48), the conspiracy ended with the burning of the Bull-n-Bear Restaurant. The courts below correctly concluded (Pet. App. 19-22), however, that the conspiracy with which petitioners were charged continued after the burning of the restaurant to include collection of the insurance proceeds, and that the taped statements thus were made in furtherance of the conspiracy. See also *United States* v. *Walker*, 653 F.2d 1343 (9th Cir. 1981), cert. denied, 455 U.S. 908 (1982); *United States* v. *Hickey*, 596 F.2d 1082, 1089-1090 (1st Cir.), cert. denied, 444 U.S. 853 (1979); *United States* v. *Knuckles*, 581 F.2d 305, 313 (2d Cir.), cert. denied, 439 U.S. 986 (1978) ("it is fair to say that where a general objective of the conspirators is money, the conspiracy does not end, of necessity, before the spoils are divided among the miscreants"). This essentially fact-bound determination does not warrant further review.

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[5] *Gelb* is also factually distinguishable from the present case. According to the court of appeals in *Gelb* (700 F.2d at 877-878), the facts presented at the trial of that case "failed to disclose any evidence of an explosion," whereas it is undisputed that an explosion took place here. Pet. App. 4.

[6] Rule 801(d)(2)(E) provides:

> A statement is not hearsay if —
>
> > The statement is offered against a party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Moreover, petitioners' reliance on this Court's decisions in *Krulewitch* v. *United States*, 336 U.S. 440 (1949), *Lutwak* v. *United States*, 344 U.S. 604 (1953), and *Grunewald* v. *United States*, 353 U.S. 391 (1957), is wholly misplaced. The defendant in *Krulewitch* had been charged with conspiracy to induce and persuade a woman to travel to Florida for purposes of prostitution. Statements made by a co-conspirator to the woman more than a month and a half after she had traveled to Florida and returned to New York, and after the defendant, the co-conspirator and the woman had all been arrested, were introduced against the defendant at trial. This Court reversed the conviction, holding that the mere existence of a subsidiary conspiracy aimed at concealing the crime could not support admission of the statements. 336 U.S. at 443-444. *Lutwak*, 344 U.S. at 616-617, and *Grunewald*, 353 U.S. at 401-402, also stand for the proposition that, "after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment."

Here, however, the government did not rely on mere concealment as a continuing aim of the conspiracy. Rather, the continuation of the venture beyond the burning of the Bull-n-Bear was based on the conspirators' ongoing attempts to recover the proceeds of the insurance policy on the restaurant. Accordingly, the decision below in no way conflicts with the principles articulated by this Court in *Krulewitch*, *Lutwak* and *Grunewald*.[7]

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[7]As the court of appeals correctly noted (Pet. App. 21 n.6), the fact that Howard was cooperating with the government at the time of his 1979 conversation with Callas had no bearing on the admissibility of Callas's statements. It is the declarant's relationship to the conspiracy, not that of the listener, that determines the admissibility of a co-conspirator declaration.

3. Petitioners finally contend (Pet. 51-64) that the government improperly withheld exculpatory evidence from them, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *United States* v. *Agurs*, 427 U.S. 97 (1976). As the court of appeals correctly held, however, "[t]he concern of *Agurs* and *Brady* is whether the suppression of exculpatory material *until after trial* requires that a new trial be given so that the evidence may be considered." Pet. App. 11, quoting *United States* v. *McPartlin*, 595 F.2d 1321, 1346 (7th Cir.), cert. denied, 444 U.S. 833 (1979) (emphasis added). Because, the court concluded (Pet. App. 11-12), in all but one instance petitioners were able to make use at trial of the allegedly withheld information, *Brady* and *Agurs* are inapposite to those allegations.

Petitioners' sixth claim of prosecutorial wrongdoing is that the government suppressed the statement of a cook who allegedly was present during the meetings between petitioners and Howard at the Bull-n-Bear and who would have impeached Howard's testimony concerning those events. The court of appeals examined that information in the context of the entire trial testimony, however, and, employing (Pet. App. 14) the standard of materiality that is applicable where the defense has made only a general request for *Brady* material (see *United States* v. *Agurs*, 427 U.S. at 112-113), concluded (Pet App. 15) that "the addition of [the cook's] testimony to the existing abundance of impeaching evidence [did not] create[] a reasonable doubt." The court of appeals' correct application of the principles announced in *Agurs* to the particular facts of this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1983

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